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DEPARTMENTS OF LABOR AND HEALTH AND HUMAN SERVICES HIGH-RISK MANAGEMENT PROBLEMS

HEARING

BEFORE THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

SECOND SESSION

MARCH 8, 1990

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DEPARTMENTS OF LABOR AND HEALTH AND HUMAN SERVICES HIGH-RISK MANAGEMENT PROBLEMS

THURSDAY, MARCH 8, 1990

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 9:45 a.m., in room SD-342, Dirksen Senate Office Building, Hon. John Glenn (Chairman of the Committee) presiding.

Present: Senators Glenn, Pryor, and Roth.

OPENING STATEMENT OF CHAIRMAN GLENN

Chairman GLENN. The hearing will be in order.

I apologize to everyone here this morning. We usually try and start these things reasonably on time, but I was at another hearing where I was making a presentation this morning on Armed Services involving some of our personnel matters in the military, and I just couldn't break out of that until the last few minutes. So I am sorry we are about 15 minutes late getting started this morning.

Today the Governmental Affairs Committee continues its oversight of management problems disclosed on the OMB and GAO lists of high-risk Government programs. High-risk is a term we use here; I think everyone probably has an idea of what it means. When we got into some of the financial, the accounting, the weak spots in Government that might be similar in nature to what happened over at HUD that everybody is familiar with, we talked to OMB, who oversees all this. We asked about trying to expand the "M" in OMB—as we have said at our hearings repeatedly—the management function. We talked to them about what their assessments were of whether there might be any more HUDs out there. They came up with a list of over 100 spots in Government where they thought there might be problems.

We asked GAO quite separately and independently to make their own assessment also, and they came up with their list of areas where they felt the financial management and the accounting systems and so on, and the general management practices, were not sufficient to make sure that we might not have other very, very serious management functions awry out there in Government someplace.

So these high-risk Government programs are the things we are looking at and having a whole series of hearings on. These problems represent extremely serious vulnerabilities in agency oper-

ations and open the door to fraud, waste and abuse. We are here today to heed the red flags flying over the Department of Labor and Department of Health and Human Services in certain areas.

Programs these two agencies administer—for example, Social Security, Medicare, Pension and Welfare Benefits—touch the lives of almost every American. All of us have a stake in their sound administration, and I believe that well-intentioned efforts are underway to achieve that goal. A few more examples from the lists reveal their importance.

Certainly the reported billions of dollars in unreconciled wages reported to the Social Security Administration and the Internal Revenue Service strikes fear into the heart of every wage earner in America. Without accurate earnings data, SSA cannot ensure that all earnings are properly credited, so that upon application the worker will receive the full benefits to which he or she is entitled. We are told that SSA and the IRS are in the process of reconciling data for the last 10 years, and as a result have resolved over $111 billion in wage discrepancies. That is $111 billion in discrepancies, not total accounts, discrepancies. Nevertheless, I remain concerned about workers whose earnings are among those differences which will never be cleared up and are in jeopardy of receiving lower benefits than they actually earned.

In the past year warnings have been sounded by the Labor Department's Inspector General that pension plans are increasingly vulnerable to fraud, waste and abuse. Protections provided under ERISA are not effective, in part because of the current limited role of the independent public accountants in pension plan audits. Indeed, the IG has compared this situation to the exposed vulnerabilities in the savings and loan industry, a comparison the Secretary of Labor vehemently rejects. In any event, workers who depend upon these pension plans for future security deserve the protection of audits that are complete in scope, properly done and go beyond just the numbers to look at compliance with ERISA requirements.

The Department of Labor must also act expeditiously to ensure there is no additional risk to the billions of Federal grant and contract dollars which it administers because of the problems and delays in implementing its new integrated accounting system, called DOLAR$. We understand that the dissatisfaction among its departmental users is growing, but that the Department is promising all will be well by April 30th. Again, the Inspector General and DOL management are at opposite poles on the question of whether this financial system will be up and will be working properly in the near term.

The Medicare program will spend about $137 billion in fiscal year 1990 for health care services for more than 34 million beneficiaries. About one billion of those costs are properly the responsibility of other primary insurers. Though this number is relatively small compared to the overall Medicare program, it remains a huge annual drain, especially in this time of so many unmet needs in Government. The Health Care Financing Administration estimates an authorized 2-year computer matching program will help recover about half of that one billion in each year. Though this pro-

gram may go a long way, I cannot help but conclude that the problem can and should be fixed sooner.

Finally, the FDA's mission of insuring the safety of the food, drugs and cosmetics we use is crucial to all our lives. I am concerned that the shocking problems uncovered in FDA's regulation of the generic drug industry, leading to eight convictions already, will impair public confidence in all generic drugs, an innovation that has saved Americans millions and millions of dollars in drug costs. We have been told that similar problems have not been found in the other application approval processes at FDA.

In these circumstances, I believe the Department, under pressure from the Justice Department, has rejected a valuable resource—the criminal investigative capabilities of the HHS Inspector General—in its efforts to ensure the integrity of all FDA activities, and that was done under pressure from the Justice Department.

On this issue, I note that tomorrow marks an unfortunate anniversary of sorts. Tomorrow will be one full year since the Justice Department's Office of Legal Counsel issued an opinion limiting the Labor IG's investigative authority to cases where Federal employees or Federal funds are involved. I feel that is too limited. That opinion, in my view, also gratuitously opined that any delegation of additional investigative authority from the Secretary would be illegal. Since that opinion hit the streets I have watched with increasing dismay the confusion and chilling effect that has been brought upon the IGs. Other IGs quite outside this department have wondered about what their status is. They are nervous about what they can do now.

But I was assured by this Administration that there was no effort underway to handcuff all of the IGs. Last September the Office of Legal Counsel issued a letter to the IGs stating that its opinion would not be applied across the board and that issues concerning the remaining IGs' investigative authority would be resolved on a case-by-case basis. The Department of Justice invited inquiries from the other agencies. Moreover, in October, Office of Management and Budget Director Darman testified to this Committee that both the Justice Department and OMB had concluded the opinion applied only to the Labor IG.

In preparing for this hearing we learned that these promises have not been kept. Rather, the Justice Department and OMB invited themselves over to HHS to challenge Secretary Sullivan's decision, reached during the height of the generic drug approval crisis, to delegate FDA felony crime investigative authority to the HHS IG. Ultimately, threats from Justice that it would not defend the delegation in any court proceeding pressured the Secretary to rescind that delegation.

There can be no doubt that the Justice Department's actions over the past year have created a climate which encourages every defense lawyer representing a client being audited or investigated by any IG to question that IG's authority to act. Indeed, such defense tactics have already occurred in a Medicare case, forcing the HHS IG to run to the Justice Department for legal opinion approving his authority to proceed. I don't believe that Congress ever intended that the Justice Department, which fought tooth and nail

against receiving its own IG until it lost that battle a year ago, should be passing day-to-day on the scope of any IG's authority.

In sum, the confusion and bureaucratic bickering that have resulted from the Justice Department's legal opinion has created an unworkable and intolerable situation for the IGs, and in many respects for Congress right along with them, and I intend to get to the bottom of this one and fix it, however we have to do it.

I have directed my Governmental Affairs staff to draft legislation, or see if we can't draft legislation, for introduction this session to amend the IG, the Inspector General Act, and straighten out both the inherent investigative authority and delegation issues. In this process, I intend to see that the IGs and the Secretaries they work for have full authority to find and stop fraud on the Government and criminal activity wherever it occurs with no arbitrary, unworkable rules involving Federal employees and Federal funds.

Just for the record the Justice Department declined our invitation to testify at this particular hearing on these issues, which I regret.

Today we will hear from Mr. Roderick DeArment, Deputy Secretary of the Labor Department and Mr. Kevin Moley, Assistant Secretary for Management and Budget for the Department of Health and Human Services. We welcome them to this hearing to tell us what each department is doing with these trouble spots and to answer the question—when will these problems no longer be eligible for anybody's high-risk list?

As a follow-on, many of the questions that we will be asking will be coming from some of the previous testimony of the IGs from our past hearings on this particular subject.

Before we proceed, Senator Roth.

OPENING STATEMENT OF SENATOR ROTH

Senator ROTH. Mr. Chairman, I welcome these hearings because they are directed at a very important aspect of our efforts to eliminate waste, fraud and mismanagement within the Federal Government. That is the follow-up to identified problems. Too often the tendency in the Congress is to focus exclusively on exposing problems. While, that is a very important function for us to engage in, it is not enough if we are truly serious about eliminating these problems. For once a problem has been identified, whether by us or by an IG or by OMB, it is important that Congress make certain that proper corrective actions have taken place.

Each agency IG is required to make recommendations on how to eliminate and prevent the repetition of problems that have been discovered. The agencies, in turn, should either implement those on comparable actions, or explain why such corrective measures are not necessary. And that, of course, is why we are here today. OMB has identified in its recently released high-risk list what it believes to be the most significant of the problems reported by each agency's IG. Today we will be hearing from the Departments of Labor and Health and Human Services. Administration representatives will be talking about these previously identified problems, the IG recommendations, and what they are or are not doing in each case.

This may be less exciting than the original exposés, but it is every bit as important if we are to improve management capacity and the financial integrity of the Federal Government.

I know that you laid the groundwork for this hearing, Mr. Chairman, and you held hearings last fall. At that time we heard testimony from the IG's office at HHS concerning the Health Care Financing Administration's management of the Medicare Secondary Payer Program. I look forward to hearing testimony on this issue today.

According to GAO, the Federal Government continues to lose at least hundreds of millions of dollars per year in the MSP program. The taxpayers are footing this enormous bill, and despite our efforts to tighten up Medicare expenditures, some private insurers are apparently continuing to try to improperly shift costs to the Medicare program. In an effort to get a better idea of what is happening, I sometime ago directed my staff on the Permanent Subcommittee on Investigations to conduct an investigation to get to the bottom of the allegations. We need to find out what corrective measures can be taken to curb the fraud, waste, and abuse that appear to be rampant in the Medicare program.

Mr. Chairman, in your opening remarks you made some comments about the problem of jurisdiction of the IG. I think that is a critically important problem that needs to be carefully investigated to ensure that the IG is within its proper bounds as well as the Justice Department and the various Secretaries. I have to say that I have some concern in this area. I do not want to see the IGs be directed into work that should be done by the agency, because then we are going to have the question who is going to oversee their work. So I think that this may well be an area that we ought to hold some hearings in order to fully determine what the problems are and how best to fix them, because it is a critically important problem, I think, if the IG is to achieve the purpose that we intended, as one of the original authors.

Thank you, Mr. Chairman.

Chairman GLENN. Thank you. Mr. DeArment, who is Deputy Secretary, Department of Labor, is accompanied by Thomas C. Komarek, Assistant Secretary for Administration and Management, Roberts T. Jones, Assistant Secretary for Employment and Training, David Ball, Assistant Secretary, Pension and Welfare, and Robert P. Davis, Solicitor. I believe all of the gentlemen are here this morning with you. We welcome everyone this morning.

Mr. DeArment, we look forward to your statement.

Thank you.

TESTIMONY OF RODERICK A. DeARMENT, DEPUTY SECRETARY, DEPARTMENT OF LABOR, ACCOMPANIED BY THOMAS C. KOMAREK, ASSISTANT SECRETARY FOR ADMINISTRATION AND MANAGEMENT, ROBERTS T. JONES, ASSISTANT SECRETARY FOR EMPLOYMENT AND TRAINING, DAVID BALL, ASSISTANT SECRETARY, PENSION AND WELFARE BENEFITS, AND ROBERT P. DAVIS, SOLICITOR

Mr. DEARMENT. Thank you, Mr. Chairman.

Mr. Chairman and members of the Committee, my name is Rod DeArment. I am the Deputy Secretary of Labor. I am pleased to appear before you today to discuss areas of concern in the management of the Department of Labor and in certain enforcement programs that the Department administers.

Mr. Chairman, I would like at this time to submit a written statement and ask permission that this full statement may be included in the record.[1]

Chairman GLENN. Without objection, the entire statement will be included in the record.

Mr. DEARMENT. Mr. Chairman, let me first say that Secretary Dole and I welcome this Committee's interest and concern in the Department's management and enforcement. Having had the privilege of working for the Senate for 7 years, I know how seriously this Committee takes its oversight responsibilities. I want to assure you that we at the Department of Labor take management and enforcement responsibilities equally seriously.

One example of this commitment is our Financial Managers Financial Integrity Act process. The Department's Internal Control Policy Board has been successful in identifying management control problems, formulating corrective actions, and tracking their implementation. Indeed, most of the issues discussed today were targeted in this process. The Department's Inspector General serves on the Board, and I am pleased to report that the IG has always been able to sign off on Board activity and reports. Since Secretary Dole and I took office, I have requested that our Assistant Secretary for Administration and Management, Thomas Komarek, and the IG meet with me each quarter to ensure that corrective actions formulated by the Internal Control Policy Board are on track. I also directed that each new Assistant Secretary of Labor that took office in this new Administration meet with the Inspector General to review past and current management problems so they can be avoided and corrected.

After our first year at the Department, Secretary Dole and I have concluded that while on the whole the Department does very well in enforcement and management matters, as with any organization, improvements can be made.

I will address the enforcement issues first. To fulfill commitments she made during her confirmation hearings, Secretary Dole has commissioned a comprehensive department-wide review of all enforcement policies, strategies and procedures. I have been directing this effort and I can report that significant progress has been made. The initial review of agency enforcement activities has been completed and the agencies' assessments and recommendations are being analyzed by the Offices of the Solicitor of Labor and of the Assistant Secretary for Policy. I expect to receive a final report, including final recommendations and enforcement strategies for each program enforcement agency, by late spring or early summer.

This enforcement review will include an evaluation of civil and criminal enforcement priorities, including strategies for utilizing the deterrent effect of criminal referrals and prosecutions; the co-

[1] See p. 39.

ordination among enforcement agencies and with the Department's Inspector General; relationships with the Justice Department, including United States Attorneys; the measurement of enforcement efforts; and other aspects of civil and criminal enforcement.

A subpart of this review—relating specifically to ERISA enforcement—will be completed within the next few weeks. This ERISA review will include proposals to address all recommendations of the Inspector General in his reports on ERISA enforcement, including the elimination of the limited scope audit exception, peer review for pension plan accountants, and ensuring that financial audits are designed to detect and disclose violations of ERISA. I will, of course, promptly provide this Committee with copies of this ERISA enforcement review.

I want to say at this point that we at the Department of Labor have found no evidence to support allegations in the press and elsewhere that there is a crisis in America's pension system. I want to reassure the Nation's workers and retirees that the pension system is fundamentally sound. By any objective measure, our pension system has never been healthier.

Nevertheless, no system is perfect, and experience indicates that there are those who are indifferent, negligent, or worse in performing their fiduciary duty to ensure the maintenance of plan assets. These wrongdoers find newer and more sophisticated ways to commit fraud and abuse, and the Labor Department must remain vigilant and implement new and more effective ways to protect plan assets.

In this connection, the Department's Pension and Welfare Benefits Administration, which we refer to as PWBA, has designed and is in the process of implementing a new computerized system to "read," analyze and select for further review and possible investigation—in accordance with 90 selected enforcement criteria—all annual reports submitted by ERISA-covered plans. Further, PWBA has established an Office of Chief Accountant to work with the accounting profession to improve employee benefit plan accounting and audit practices. Finally, the Department has developed a process to refer substandard accounting work to the AICPA and state Boards of Accountancy for disciplinary action.

More recently, the Administration submitted to Congress, as part of the President's proposed fiscal year 1991 budget, a request for 100 new PWBA enforcement positions, a 33 percent increase in the PWBA enforcement staff. This represents the largest annual increase in PWBA enforcement positions since ERISA's enactment in 1974, and it will greatly enhance our ability to enforce ERISA. The Department is also seeking a substantial corresponding increase in legal staff in the Office of the Solicitor of Labor to litigate the additional enforcement cases that should result from these increased PWBA enforcement efforts. This request for a major increase in ERISA enforcement and legal staff is concrete evidence of this Administration's commitment to strong and effective ERISA enforcement.

I will turn now to briefly discuss the management issues with which I understand the Committee is primarily concerned. First, there are two management issues arising under the Job Training Partnership Act, which is referred to as JTPA. That Act, passed in

1982, replaced the old CETA job training programs. It increased state and local control of Federally funded job training, and emphasizes linkages with the private sector and community organizations, including businesses, schools and labor organizations. The JTPA program is funded at $3.9 billion, about three-fourths of which is provided to the states in grants. It services approximately 1.7 million individuals. I have described the JTPA program in more detail in my written submission.

Last year the Department took action to address the use of fixed unit price performance-based contracts that caused JTPA cost accountability problems. To attack this cost accounting issue, the Department responded promptly, revising and disseminating new JTPA contracting guidelines in March of 1989. It also provided new training for Federal and grantee staff, and increased Federal monitoring of JTPA accounting.

To address this problem on a long-term basis, the Department included corrective provisions in the JTPA amendments which were submitted to Congress in July of 1989. These corrective provisions are part of S. 543, the JTPA Amendments bill, that we hope the Senate will take up this month. These provisions will require more explicit accounting for training, administrative and other grantee costs in strict compliance with statutory standards and cost limitations. We have been working diligently to ensure passage of the JTPA Amendments and we hope that they will be passed soon by Congress, so that these needed reforms can be permanently implemented.

Another JTPA management problem concerns adequate audit coverage of JTPA funds under the Single Audit Act, which provides that state and local jurisdictions which receive and expend a significant portion of Federal JTPA funds will generally be subject to only one Federal audit. The problem for JTPA is that a single audit, part of a larger Federal program audit, sometimes results in the JTPA programs not even being addressed. The Department brought this problem to the attention of OMB last July and OMB responded in October 1989, listing the Single Audit Act issue as a high-risk area for the Department of Labor.

To improve the audit coverage of JTPA funds, we are developing a full list of deficiencies. As a first step in the process, the Department's Inspector General will be completing a review of this issue in June. At the conclusion of that review, we will determine what actions should be taken to address this issue and forward any needed recommendations to OMB for action.

The second area of management issues involves inadequate financial accounting systems. Both the Comptroller General and the Administration have placed a high priority on replacing outmoded agency financial accounting systems. Moreover, our Inspector General pointed out a number of significant accounting and internal control gaps in DOL's old Integrated Accounting System. As a result, the Department has decided to implement an entirely new financial accounting system for its own accounts known as the Department of Labor Accounting and Related Systems, or "DOLAR$" for short. It is a commercially developed accounting system previously implemented successfully at ACTION, and at the Secret Service by Ernst & Young, a big-6 accounting firm. The Department of

Health and Human Services is also planning to use this basic system.

After testing DOLAR$ last year, the Department began implementing the system this year. Obviously with the installation of any new complex system there are a number of unanticipated difficulties that have to be overcome. We have successfully produced interim DOLAR$ reports for the first quarter of fiscal year 1990 on the Department's salary and expense, or "S&E" accounts. We hope to have useable DOLAR$ reports for our grant accounts by April 30th. When all subsystems are completed, the Department will have a vastly improved accounting system for its own accounts that will exceed all applicable GAO and Treasury Department accounting requirements. The Department's Office of Administration and Management is working closely with the Inspector General to develop the DOLAR$ system as promptly as possible.

Finally, Mr. Chairman, there were two other areas of management that I covered in my written statement, that is, management problems relating to the unemployment compensation system, and the Department's purchase of automated data processing systems, but in the interest of time and at the suggestion of your Committee staff, I will refer the Committee to my written statement on those two matters.

In conclusion, Mr. Chairman, let me reiterate that Secretary Dole and I and our new management team at the Department of Labor will continue to work with our Inspector General to identify and resolve high-risk management and enforcement matters, including those discussed this morning. We are pleased that our FMFIA process has identified certain of these problems and we are committed to continue this process vigorously. We are working aggressively to address each of these issues. We are tracking our progress, and with continued efforts of our enforcement agencies and our Inspector General, we feel confident that we will minimize and eventually eliminate these problems.

Mr. Chairman, I am ready to answer questions. As you noted, we have here a number of the Assistant Secretaries and the Solicitor of Labor who have direct management control over some of the areas that I have touched on, and we welcome your questions.

Chairman GLENN. Fine, thank you very much, and you may want to have them join you at the table, or however you wish to handle it. It makes no difference to me.

I do have a question I think that would relate to Mr. Davis, so if he wanted to come to the table.

Mr. Davis, as Solicitor of the Labor Department, do you view the Office of Legal Counsel's March 1989 legal opinion as binding on the Department of Labor?

Mr. DAVIS. Yes, I do, Mr. Chairman.

Chairman GLENN. Now, is that a change of policy of the Department?

Mr. DAVIS. I can't speak before January of 1989, but it is my general impression, Mr. Chairman, that it is long established in the Executive Branch that Office of Legal Counsel opinions are controlling as a matter of law.

Chairman GLENN. Well, that was not the opinion out of your department earlier, because there was a November 24, 1986 letter

from your predecessor, George Salem, to the Justice Department, and I read from it in part, "Thank you for notifying us of OLC's views on the matter involving the Comprehensive Crime Control Act of 1984, but as the Department's representative stated at the July 11 meeting, we view the memorandum as an internal Justice Department opinion which has no binding effect on the Department of Labor."

Now, what you just said this morning would be, obviously, diametrically opposed to that. Which policy prevails, now?

Mr. DAVIS. Two reactions, Mr. Chairman. First of all, I am not familiar with the letter. I do have a copy in front of me. I would like to read it and respond more fully for the record. Second, I will note that the letter is addressed, apparently, from Mr. Salem to the Deputy Assistant Attorney General for the Criminal Division, and I am not aware of any precedent where Criminal Division opinion is given controlling effect in the Executive Branch.

Chairman GLENN. Okay. We would appreciate your additional comment on that, because it was our opinion that Mr Salem's letter expressed the view of the Department with regard to the limitations that DOJ had placed on you.

Mr. DeArment, the IG testified before us last October, and I quote from some of his testimony: "During meetings with the Inspector General, Wage and Hour and Solicitor officials told us they did not believe in criminal investigations and they said that their primary and only objective was the recovery of back wages. Their refusal to cooperate resulted in a premature termination of the undercover operation and precluded the collection of evidence needed to document certain violations, including fraud against HUD and various lending institutions, fraud against HHS by virtue of inflated nursing home construction costs and reimbursement for services provided to patients, public corruption in the form of bribery, labor corruption in the form of payoffs and other Davis-Bacon violations."

What has been done to correct this?

Mr. DEARMENT. Well, Mr. Chairman, I can't speak for the Department officials in the past, but I can tell you that the current management of the Department of Labor believes in effective criminal enforcement. I think that particular case demonstrates one of the problems with independent Inspector General criminal enforcement that is not coordinated with the rest of the Department. In that particular case, as I understand the facts, and I have heard both sides of the story, we had a Wage and Hour Division investigator, who felt that he was offered bribes in his conduct of an investigation. That apparent attempted bribe was reported to the Inspector General. The Inspector General, without coordinating fully with the Wage and Hour Division, commenced an undercover criminal investigation.

The Wage and Hour Division continued its efforts to recover the unpaid back wages, and asked HUD to withhold those back wages from a Federal contract payment HUD was to make to the employer. At this point, after the Department had written to HUD asking for the wages to be deducted from the contract payments, the Inspector General then emerged, and asked that the Department withdraw their request from HUD, since it jeopardized the under-

cover investigation. There was concern on the part of the Wage and Hour Division that without a recovery from HUD there would be no way to recover the employees' back wages.

If we are going to have two different Labor Department units working in the same area, there has to be better coordination. This case perfectly illustrates the problem of lack of coordination between undercover operations and parallel civil investigations to recover wages. Civil cases to recover wages are a vital part of our mission—to make sure that the employees that have been unlawfully underpaid get their just due—and I think that the overall enforcement effort is not enhanced if we have two agencies working in their separate and uncoordinated orbits.

Chairman GLENN. If something else is going on and the IG is getting into an area that you are already handling, why wouldn't be very simple just to tell him that?

Mr. DEARMENT. The difficulty that we have, Mr. Chairman, is if the rest of the Department is not aware of that kind of IG activity, we cannot tell somebody that they ought to coordinate better. I have tried to get better coordination, and will continue to try to achieve that objective.

Chairman GLENN. Well, you got a little bit afield here from my original question, I think, because the question is this, let me read that again, the first part of it: "During meetings with the Inspector General, Wage and Hour and Solicitor officials told us they did not believe in criminal investigations, and they said that their primary and only objective was the recovery of back wages."

Does the Department believe in criminal investigations?

Mr. DEARMENT. Yes, we do.

Chairman GLENN. So what the IG said was wrong then; is that right?

Mr. DEARMENT. Well, the IG is presumably quoting officials who told him that.

Chairman GLENN. That is what he said. He said that Wage and Hour and Solicitor officials stated.

Mr. Davis, what do you think about that. Do you go ahead with criminal investigations.

Mr. DAVIS. Mr. Chairman, absolutely. And second, I have certainly authorized no one in my office to make such a statement. It certainly does not reflect my position.

Mr. DEARMENT. I do not think that reflects the position of the Department. That is one of the reasons that Secretary Dole directed that we reexamine the focus of the enforcement effort. I believe that you have to have a combination of criminal and civil enforcement.

Chairman GLENN. How many criminal investigator positions are requested in the 1991 budget? Do you have a figure on that?

Mr. DEARMENT. I do not know. I am not sure that they are broken out——

Chairman GLENN. Was there an increase in the number of positions requested?

Mr. DEARMENT. In the Pension and Welfare Benefits Administration, which I referenced, there are 100 positions requested. Some of those will be related to criminal enforcement. In fact, PWBA conducted 27——

Mr. BALL. Twenty-three.

Mr. DEARMENT [continuing]. Twenty-three criminal cases last year.

David, perhaps you can talk about the allocation of criminal cases, given the resources.

Chairman GLENN. Mr. Ball.

Mr. BALL. Chairman Glenn, the Pension and Welfare Benefits Administration conducts investigations. It does not make a distinction between civil and criminal investigations. But once it has begun an investigation, if it determines that there are criminal matters involved, which would become apparent perhaps a month or two after you are into an investigation, it would then refer the matter to the U.S. Attorney and work with a U.S. Attorney in pursuing the criminal investigation.

Chairman GLENN. Well, what I would like to have, if you can furnish it for the record, I know you may not have these figures with you this morning, but if you could give us for the record how many criminal investigator positions, 1811s I believe they are, are requested in the 1991 budget for each of the following programs: OSHA, Mine Safety and Health Administration, Pension and Welfare Benefits Administration, Employment Training Administration, Employment Standards Administration, and Office of Labor and Management Standards.

We can give those to you. Those are six different increases there.

Mr. BALL. Senator Glenn, if I could add a comment on this, I think that that question is asking whether there should be civil and criminal investigators. Certainly in the Pension and Welfare Benefit Administration we function in the same way that the SEC does. We have criminal investigations, but we do not have criminal investigators any more than the SEC does, and yet they have an outstanding reputation for integrity and prosecution of criminal matters, even though they don't have any person on their staff that is identified as a criminal investigator.

Chairman GLENN. I know my time is up, but if I could just proceed for 15 seconds here, are there any 1811s criminal investigators as part of your staffs?

Mr. BALL. Well, no one is designated specifically with that title as "criminal," nobody in the Pension and Welfare Benefits Administration.

Chairman GLENN. But your people do criminal investigations?

Mr. BALL. Yes, sir. They are trained. We have Federal training and we have our own training in criminal matters in the employee benefit area. But when we get to a criminal matter, we work with the local U.S. Attorney, just as the SEC does when it has a criminal matter.

Chairman GLENN. Okay. I guess with some of the allegations we have heard I would feel a little more comfortable about this if I thought we had all criminal investigators over there who also do some of the civil cases instead of all civil investigators who also happen to do some of the criminal cases. Maybe the emphasis needs to be changed a bit.

Mr. BALL. We do send people to jail for violations of the employee benefit laws.

Chairman GLENN. Okay. But the criminal investigators are people who are specifically trained to deal with and root out cer-

tain areas here that maybe a straight civil investigator would have a little more trouble doing. I think you would be well advised to get some criminal investigators in there too.

Mr. BALL. Well, our people do get criminal training, Senator, as I mentioned.

Mr. DEARMENT. Senator Glenn, I think you make a good point. It is one that we have focused on in our enforcement review as to whether we have adequate training and personnel to do this kind of criminal investigation. We will certainly provide the requested information with respect as to the number of 1811 personnel. But I think that we will probably find that the pattern that David referred to is common throughout the Department, and that is one that we should address.

Chairman GLENN. Good. Senator Roth.

Senator ROTH. Thank you, Mr. Chairman.

Mr. DeArment, it is nice to have you here on the other side.

Mr. DEARMENT. Thank you, Senator.

Senator ROTH. It doesn't seem very natural, I will say that.

Mr. DEARMENT. I would prefer writing the questions to having to answer them.

Chairman GLENN. Come on up, you might be able to feed him some excellent questions. [Laughter.]

Senator ROTH. When an independent public accountant discovers an ERISA violation in a pension plan being reviewed, should that accountant be required to report that violation to the Pension and Welfare Benefits Administration?

Mr. DEARMENT. Well, we think so. We have been trying to work with the accounting profession, following up on several accounting standards that the profession itself has issued, Accounting Standards 53 and 54, under which accountants are required to identify and disclose certain unlawful conduct. Frankly, up to this point somewhat disappointed by the response of the AICPA with respect to these accounting standards we have requested that the AICPA insert specific procedures in the audit guides that they have for ERISA audits, to test for those violations and disclose them.

Except in the most egregious cases, we would like to have disclosure of those violations to be part of the normal financial audit and included in financial statement that is done annually and included in our Form 5500. By including this disclosure in Form 5500 we will not have a blizzard of pieces of paper to deal with.

Thus, we would like to build disclosure of ERISA violations into the normal financial audit cycle that will come as part of Form 5500, and we are working with the accounting profession to try to get them to do that.

Senator ROTH. I gather that to date you haven't had much success?

Mr. DEARMENT. No, we have, to date, been very disappointed by the AICPA's response. We were hopeful, reading their accounting standards and concerning the disclosure of unlawful activity, that they would seize this opportunity to close the expectations gap. We are sending them yet another letter. We have corresponded and have had meetings with them. If we are ultimately unsuccessful, then we will have to explore other ways to address the problem. On one hand, the IG has even suggested maybe if we do not get satis-

faction that we ought to terminate financial audits entirely. I would rather not do that, but would prefer to find a way to make the financial audits more meaningful. We may have to seek some legislation. But at this point, I think that we would rather try to reach an accommodation with the AICPA.

Senator ROTH. Now, if full-scope audits were required of all pension plans with more than 100 participants, how costly a burden would that be for the smallest plans in that category? For example, where there were 100 to 200 participants?

Mr. DEARMENT. We have——

Senator ROTH. If I might just finish, Rod. The real question is, would the benefit outweigh the cost?

Mr. DEARMENT. That is the relevant question to ask in any area where we may propose to expand audit coverage. The limited scope audit exception provides that whenever a plan's assets are held in a regulated institution—whether an insurance company, a bank, or a savings and loan—the plan can avail itself of this exception and the accountant is instructed not to examine those assets. As a result, since the accountant cannot examine those assets, he will express no opinion as to whether the financial statement accurately reflects the financial condition of the plan.

So consequently, when accountants give such a qualified opinion, the accountant's work is useless to the Labor Department. In terms of what the additional cost will be, we put that question to the AICPA to try to weigh the cost and benefit. My recollection is that the AICPA thought it might increase audit time between 10 and 30 percent——

Mr. BALL. Up to 30 percent.

Mr. DEARMENT [continuing]. In additional audit hours. They could not give us a precise cost figure, because in many cases these costs are borne by the company as a whole. My recollection is, however, that the range of costs can be from nothing to a 20 percent increase.

You have to weigh that increased cost against the fact that we are essentially "flying blind" because accountants so qualify their opinions that the opinions are really not valuable. I would like to point out that the AICPA has endorsed the repeal of the limited scope audit exception. Repeal, will, of course, require legislation.

Senator ROTH. Let me turn to the JTPA. What is the Department doing to bring the JTPA into compliance with the requirements of the Single Audit Act?

Mr. DEARMENT. There really have been 2 Single Audit Act problems. First, particularly in some of the administrative sub-units, what they call SDAs, or service delivery areas, the required audits were not being properly conducted in a timely fashion. This has been corrected so that all of those sub-units have been audited. We have established procedures to make sure that in the future the SDAs are monitored and that they continue to be audited on a cycle of once every 2 years. It is a problem of management to make sure that those sub-units are properly audited, and I think that we have that under control.

There is a second Single Audit Act issue. When a state does its single audit under the Single Audit Act we do not think there is adequate focus on our programs. We recognize that the Act was es-

tablished to balance the burden on the states so that they do not have 100 different auditors coming in and doing separate Federal audits. Nevertheless, often JTPA, or other Department of Labor programs, are such a small part of the whole that the problems associated with these programs are not identified. We have identified this concern to OMB. OMB has asked us to take this concern beyond the anecdotal evidence that we have and see how extensive this problem is under the Single Audit Act. That is what the Inspector General study is addressing and we expect their report in June. If that study demonstrates our concern to a comprehensive problem, then DOL will consider making recommendations as to how the Single Audit Act ought to be changed. We will make such recommendations to OMB and they will then presumably make whatever recommendations to Congress that are appropriate.

We have identified this as a problem in the Labor Department. I cannot believe that this problem is unique to the Labor Department, but we will know more after the IG study comes out in June.

Senator ROTH. Next I would like to turn to the question of the financial systems. Now, it is my understanding that your department viewed problems with implementing the DOLAR$ system as being, shall we say, routine start-up problems.

Is that the case? Have these problems been no greater than those experienced by other organizations with similar systems? And when do you think the system will finally be fully operational?

Mr. DEARMENT. Let me address the second question first. We hope to have useable reports of all the major components, salary and expenses, and grants, by April 30th. Certainly I think that many of the problems of getting this system in place are routine problems of instituting an entirely new automated general ledger system. We have a task force of 30 people who are working on implementation of this system. We have probably a thousand employees of the Labor Department that are inputting data into the new system. Of the 30 people working directly on the system, probably a half dozen are Inspector General personnel who have worked on the development of this system from the very start.

I do not know whether we have experienced more or fewer start-up problems than other agencies. Maybe Tom Komarek would have the answer. I do not have the cross-agency experience to answer that. I know that this particular Ernst & Whinney software system, which is called Federal Success, has been successfully put in place in ACTION and in the Secret Service. I understand that HHS is about where we are in implementing that system at HCFA and at the Centers for Disease Control.

Mr. KOMAREK. I would only add to that, Senator Roth, that we are the first cabinet-level agency to try to do it cabinet-level wide so we have had some additional problems because of that, but I do feel, as the Deputy Secretary indicated, that by April 30th we will have useable reports. We will still be making corrections as we go, but those reports will be useful for Department of Labor managers to manage the funds that we need to manage.

Mr. DEARMENT. I think that one thing that we have to do is to measure this highly technical implementation to see where we are falling short and what system changes need to be made. We have invited the Inspector General to review how we do after April

30th—because I view the Inspector General as an important watchdog. We hopefully will have a review by the Inspector General after April 30th to see whether our expectations have been met.

Senator ROTH. Thank you, Mr. Chairman.

Chairman GLENN. Thank you. To follow up on that, as I understand it, you say the system will be on line and working by April 30th; is that correct?

Mr. KOMAREK. Mr. Chairman, what we are saying is we are going to be producing useful reports by April 30th.

Chairman GLENN. Well, out of the reports it is supposed to eventually take care of, what percent of those reports will be produced by April 30th?

Mr. KOMAREK. All the reports that are needed for fund control will be produced by April 30th and they will be very, very useful for effecting the fund control that is needed.

Mr. DEARMENT. We have had DOLAR$ reports for the first quarter of this year. Those reports were adequate with respect to the salary and expense component of the accounting system but the system did not produce the reports on DOL grants. Those grant reports had to be manually added from a back-up system that we have that is called the Regional Accounting System.

So the salary and expense part was adequate, but the grant portion had to be derived from this RAS system. There is also a gap because the system did not include some miscellaneous receipts to the Department. For example, the system did not include the receipts we get under the Freedom of Information Act or for jury duty. Therefore, there is that small gap that has to be put in place for April 30th.

Chairman GLENN. You referred to grant programs, that is a major part of your effort, isn't it?

Mr. DEARMENT. That is correct. The grants reporting is the part that we need to get on line by April 30th to really have a full operating DOLAR$ system. Now, we have an accounting system that already deals with grants. It is a back-up system, but we expect that once we get DOLAR$ in place that back up system will not be necessary.

Chairman GLENN. This was sort of a hurry up operation to get this into place I know, and there was supposed to be, as I understood it, a test plan that was to be executed along with it to make sure we were on the right track with most of it.

Has that test plan been implemented or completed?

Mr. KOMAREK. We have a group of Inspector General staff working with my staff, and as we go forward with the implementation they are testing the entire accounting system. There has been some problem which we have run into in coordination with the IG in terms of our being able to do exactly the kinds of tests that the IG would like to do.

The issue, Mr. Chairman, involves something called source codes. It is basically the controlling computer language that allows a person to track how the data goes from being input into the computer to reports that come out of the computer. I recently agreed with the Inspector General to go back to Ernst & Young and try to acquire those source codes so that once we get those the Inspector

General will be able to do all the tests that they would like to be able to do.

Chairman GLENN. Well, is the test program one that you designed to see if the whole system is working right, or are you just depending on the IG looking over your shoulder and saying, "Let's test this part, let's test that part"?

Is there a regular test plan that we are adhering to?

Mr. KOMAREK. We do have a regular test plan, and it is done in conjunction with the Inspector General: My staff works side by side with the Inspector General in doing these tests.

Chairman GLENN. As I understand it, the head of the DOLAR$ task force recently resigned. Was that action related to the IG's critical report on DOLAR$?

Mr. KOMAREK. Mr. Chairman, no, that resignation and movement to another job was occasioned by the fact that this particular individual was an ADP specialist whose specialty was designing and developing these kinds of systems. What we needed at this point in time was an operational-type individual, an implementer as opposed to a designer. So we are moving him off to another area where he can be involved in design work and we have replaced him with an ADP specialist who is more of an operator.

Chairman GLENN. Let me read some of the IG's comments back in a different area, back to our previously discussed area here. He is saying, "I am saying that in these particular programs there are cases that have been addressed civilly where there are apparent fact patterns suggestive of Federal criminal violations." My concern is about the process of the Department of Labor, who decides what the remedy is, what is commensurate with the crime?

"And when you find that 99 percent of your efforts are all tilted towards civil or administrative remedies, I submit something is wrong."

I would ask his question here this morning. Who decides what this remedy is? What is commensurate with the crime?

Mr. DEARMENT. The specific enforcement agency would, in the first instance, decide—based on the facts that are determined—whether the matter should be referred to a U.S. Attorney or whether it should be pursued civilly or both. I do not know what particular program area the Inspector General was referring to there. We have made criminal referrals made in virtually every enforcement agency in the Department.

Chairman GLENN. As to whether it is going to be civil or criminal in the course of an investigation, you leave that up to the individual head of a department or agency; is that correct?

Mr. DAVIS. Senator, it varies depending upon the program. Let me give two examples to show you the difference. In the Pension and Welfare Benefits Administration headed by Mr. Ball, they have such a competent investigative staff and the legal issues matter so little, if you will, in the initial determination as to whether there is actionable criminal conduct, that PWBA makes referrals directly to the U.S. Attorneys' office for additional criminal investigation.

I will contrast that with the Occupational Safety and Health Act where there are very specific and stringently stated grounds for criminal prosecution. In that case, OSHA refers a case to us in the

Solicitor's office for appraisal. We will prove a citation on a civil basis, and also if there is the requisite evidence of a criminal violation, which we match up by looking at the statute—frankly, it is very easy to ascertain whether there is such evidence because you have to have a worker death—we then refer that from the Solicitor's office to the U.S. Attorney's office.

Speaking only for the Solicitor's office——

Chairman GLENN. Do you pass on all those before they go to Justice, or can they refer them directly?

Mr. DAVIS. At the Solicitor's office we have a whole system worked out in terms of the type of activity. Some of them are done in the national office, many of them are done in regional offices. Frankly, one of our efforts that we have undertaken is to make sure that the U.S. Attorneys take our cases, and as a result, I have taken a lot of my time in calling up U.S. Attorneys when we have what I think is a good case and getting them to prosecute it. Our criminal referrals in OSHA have doubled and are close to trebling since Secretary Dole has come into office, and I am looking forward to some very successful prosecutions.

In fact, we just received a very good guilty plea and have the U.S. Attorney recommending jail time for an OSHA violator in the Kansas City area recently.

Chairman GLENN. I am still concerned about this ratio, because we keep hearing things and hearing rumors about some of the areas that should be investigated that are criminal. In 1988 PWBA, for instance, conducted fewer than 25 criminal investigations while opening 1,600 civil investigations. Is that a normal ratio?

Mr. BALL. Could I comment on that, Mr. Chairman? That ratio of civil investigations to criminal investigations is almost exactly the same ratio that you find in the SEC. SEC has a civil statute, securities laws to enforce. We have ERISA, which is essentially a civil statute, to enforce. We have roughly the same relationship of civil investigations to criminal investigations as they do and we have about the same results, and they have a good reputation for integrity and prosecution of their laws.

Chairman GLENN. Well, I am not sure that the SEC analogy is exactly comparable here. What about other agencies of Government that investigate things like this, other departments, would their ratios be about the same as this?

Mr. BALL. I can't comment on other agencies.

Chairman GLENN. Where environmental law or other types of law are being upheld. There are all sorts of civil investigations and criminal going on all the time. You liken to SEC because you apparently have a pattern very similar to theirs, but I am not sure that SEC investigations are completely analogous to what we are talking about here.

Mr. BALL. Well, the reason I thought it was appropriate is our job is to enforce the pension laws and their job is to enforce the security laws, and to me there would seem to be a parallel.

Chairman GLENN. Just one other question if I might. The IG was very critical of the referral rates. He suggested that Congress should be skeptical also of this major study of enforcement that has been underway since 1989. He says,

Indeed as we speak there is a review underway in the Department of Labor of its enforcement responsibilities with a focus on its criminal enforcement responsibilities. I have lost count of the number of reviews. I haven't seen any action, nor, I believe, has the Congress seen any action of good faith effort. We have heard this song before. I encourage you to approach it with a heightened sense of skepticism.

Now, the study is still going on and has been since last July. My question would be, during the period of this study has the Department of Labor referred any cases to Justice for prosecution or to the FBI for further investigation while this study is going on?

Mr. DAVIS. Senator, can I take the initial crack at that one, and then I am sure Mr. DeArment will have some points from his overall managerial perspective.

I was sworn in as Solicitor in June. Many of my colleagues were not sworn in until early fall, operating Assistant Secretary colleagues. I am sure that if we had wanted to turn to many good people in the Department who have worked there for a long time to ask them once again for their ideas, which in fact we have done, but relying only upon that without involving our new team and their ideas, we could have gotten the job done faster.

It has taken awhile to get these folks in their jobs, get them familiar with it, and we are now moving out at a high rate of speed. I think the answers, for example, you heard from David Ball show that he is heavily involved with his program. He has been very heavily involved with this process and now I think we can make real progress and bring this thing to a conclusion.

The second is, I am, just being familiar with the general case flow, convinced that we have a very good volume of criminal referrals. However, I don't have those data with me, and I would be glad to supply them for the record.

Mr. DEARMENT. But I think it is fair to say that there is no disruption while we are studying this. Indeed, it probably has a very healthy effect of focusing on the criminal versus civil enforcement. We make criminal referrals every week at the Labor Department.

Chairman GLENN. One of our major problems in Government—before I turn this over to Senator Pryor here—one of our major problems is this turnover of people. And some of us have been here for awhile, I am in my 15th year here right now, and the average top level person in the Government appointed position, high level department position, is on the job about 22 months I believe is the current figure.

And so I appreciate the position from the position you are in, having just come into the job, but you have to appreciate our position where we get tired of hearing this business, "Well, I just got there and I got to do a new study and I got to get some new people and I got to do this," and then that takes 3 or 4 months and then about a year and a half we get a little productive work and then we are back to hearing, "Well, I just got here and I got to do another study and I have got to get some new people." And then we hear that over and over again, so that falls on a little hard-of-hearing ears around here sometimes.

Mr. DAVIS. Senator, absolutely. I came to Washington about the same time you did, although in a considerably more junior status, and have spent more than half that time in the Government in various positions and——

Chairman GLENN. Well, that's the problem. I don't now how to solve it. There isn't any solution to it, but it is one that we have to continually grapple with it here. I get very envious of the British civil service system sometimes where they have a real ongoing system of Government there more than we do. That is an editorial comment.

Senator Pryor.

Senator PRYOR. Mr. Chairman, I have no questions for this panel. I will have some for the next panel. Thank you.

Chairman GLENN. All right. Good.

The acting IG has been acting for sometime now. What is the status of either his appointment or a new permanent IG appointment to the Labor Department?

Mr. DEARMENT. It is my understanding that the White House is about to send up a nomination.

Chairman GLENN. All right.

Senator PRYOR. By the way, on that question, Mr. Chairman, are there a lot of positions in this labyrinth of the system that are unfilled at this time?

Mr. DEARMENT. We have three positions that I am aware of in terms of top level positions for which we are awaiting nominations or confirmations.

Senator PRYOR. Are those positions that are critical to the functions of these various agencies?

Mr. DEARMENT. Well, I would be hard pressed to say none of them are not critical. Let me just tell you what they are. One is Inspector General; the second is the Wage and Hour Administrator, which is a very important enforcement activity; the third is the Director of the Women's Bureau, which is not an enforcement agency.

Senator PRYOR. Have these been filled since President Bush came to office?

Mr. DEARMENT. Yes. The prior Inspector General was already in office and resigned as of the 1st of October. The Wage and Hour position was occupied by the previous Wage and Hour Administrator until several months ago. The initial nominee was turned down by the Senate Labor Committee, We are now awaiting a second nominee.

Senator PRYOR. When you have these sort of vacancies in critical positions, don't you see then indecision sort of running the show?

Mr. DEARMENT. I do not think that is the case. In every case the acting person has not been indecisive. For example, if you think Acting Inspector General Raymond Maria is indecisive, then you have not talked with Ray.

Chairman GLENN. We have talked with Ray. [Laughter.]

Mr. DEARMENT. And I do not think that we have had any diminution of the IG function. I think that the same has been true in the Wage and Hour Division. The Wage and Hour Administrator is somewhat unique in that while the Administrator job is a PAS position, it is supervised by a very effective Assistant Secretary, Bill Brooks. Bill has very aggressively managed that Wage and Hour Division with the help of an acting administrator and a very effective Deputy Assistant Secretary.

Senator PRYOR. I am embarrassed, I just told the Chairman I had no questions.

Chairman GLENN. Go ahead.

Senator PRYOR. No, that is all. It kind of reminds me of what Hewitt P. Long said one time, "I lied." So I apologize, Mr. Chairman, I have no further questions.

Chairman GLENN. Obviously, we are very concerned about some of the allegations made, not just by the IG but from other sources too. It is more than just the IG, and he is very direct and gives his views on things and that is good, and that is what we depend on.

Let me look at OSHA though just a minute. The IG made some comments about OSHA, about an appalling lack of criminal enforcement. But it is not just from the IG, because here is a statement that is contained in a report issued last year by the House Committee on Government Operations, our sister committee on the other side of the Hill.

Let me quote: "Since the establishment of OSHA some 18 years ago only 42 cases have been referred by OSHA for criminal prosecution. Only 14 of those were prosecuted, resulting in 10 convictions with fines or suspended sentences."

Listen to this sentence: "In the 18 year history of OSHA no one has ever spent one day in jail for violation of the Act."

Now, I don't know, maybe it is a super pure operation, but I just find that very difficult to believe.

Mr. DEARMENT. One thing, Senator Glenn, with respect to OSHA criminal violations, we have doubled the referral rate under Secretary Dole.

Chairman GLENN. But not the conviction rate.

Mr. DEARMENT. Well, the conviction rate will have to——

Mr. DAVIS. That will come when those cases are prosecuted.

Mr. DEARMENT. That will come when those cases are prosecuted. But one thing to remember with respect to a criminal case under OSHA, it is a very difficult case to establish. First, you only——

Chairman GLENN. That is the reason we would like to see some trained criminal investigators.

Mr. DEARMENT. One of the problems, Senator Glenn, is in order to have a criminal case you have to have a worker death. If there is no worker death, there is no criminal jurisdiction in the Labor Department, or elsewhere in the Federal Government.

Second, you must establish not only a worker death, but you have to demonstrate that the employer acted in willful noncompliance with a specific safety standard and that directly leads to that employee's death. It is a difficult standard to meet. We are working hard to make sure that there is not willful conduct that leads to those deaths, but where we find them we will prosecute them. And indeed, I think that we have a procedure to examine every employee death to look and see if that standard is met.

Mr. DAVIS. Senator, if I could add to that, we have made a conscious effort in the Department to have a more vigilant OSHA, and for whatever reason, perhaps people around the country have gotten the impression that maybe OSHA didn't care about its criminal jurisdiction. Well, I think we have changed. We have sent a different message and I think we are changing that impression.

I have a number of matters, including one very egregious multiple death case, that I am handling directly with the United States Attorneys, and I find that when you have a worker death case competing with multimillion dollar drug cases, organized crime cases, for a U.S. Attorney's time, if it takes me getting on the telephone, and frankly, for that matter, if it takes the Deputy Secretary or the Secretary getting on the telephone then I would recommend it in order to get these cases prosecuted. That is what we are going to do. That is a different message I think from this Labor Department.

Chairman GLENN. Okay. I will see if Senator Roth has any questions in just a second here, but I would go back to a previous statement I read here, and this is what really concerns us.

The IG says that in meetings with Wage and Hour and Solicitor officials—that is your Legal Department—they told us they did not believe in criminal investigations, said their primary and only objective is recovery of back wages. And he goes ahead and expands on that, "Their refusal to cooperate resulted in a premature termination of the undercover operation and precluded the collection of evidence needed to document certain violations, including fraud against HUD, various lending institutions, fraud against HHS by virtue of inflated nursing home constructions costs and reimbursement for services provided the patient, public corruption in the form of bribery, labor corruption, former payoffs and other Davis-Bacon Act violations."

That is about as heavy as you can get. Are we set up to address that? Do we have the criminal people, do we have the civil people?

I don't know how much stronger it could be. You say it is only where death occurs in OSHA. Well, okay, that is fine. But how about these other things? These are heavy duty crimes. These are not light things we are talking about. And they seem to be thwarted and people say, "No, we will go civil, we don't want to be too tough on folks."

Mr. DEARMENT. No, that is not the policy of the Department.

Chairman GLENN. Let me turn this around. What could we do to help you do a better job? Do you need more people?

Mr. DEARMENT. Yes.

Chairman GLENN. Have you put in for it? Is it in this year's budget?

Mr. DEARMENT. Yes, we have. We have got more people in OSHA enforcement and we have more people in pension enforcement, and we welcome your support for those additional resources.

Chairman GLENN. Were you cut back any from what you requested from OMB?

Mr. DEARMENT. With respect to our enforcement budget request, initially there was a denial. We appealed that denial and OMB gave us everything that we requested in the enforcement area.

Chairman GLENN. Okay. We are going to have to move along shortly here.

Senator Roth.

Senator ROTH. Well, let me, Rod, say that I am very sympathetic to where you need additional personnel, but as just one Senator, I have to say that I am very concerned about the fact that we just seem to keep adding personnel. We have a very serious deficit

problem, and my good colleague from Arkansas rightfully has raised a lot of questions about consultants and the cost of that. But just adding personnel can be a very serious financial drain as well.

So as one Senator, I am going to be very interested in not only where you add, but where can you reduce, because I think frankly this Congress, time and again, continues to add and grow without looking at what we are doing. Now, I happen to think that criminal prosecutions can be a very important part of enforcement, but it is not the guts of it in my judgment.

The guts of it is a system that ensures that the various people being regulated or covered are enforced, so I will be interested in seeing the whole picture as to how you are proceeding. It is good, and I think it does have a valuable lesson to prosecute, but that is not in and of itself going to be the answer to strong enforcement of safety and other provisions.

Mr. DEARMENT. Well, Senator, I certainly agree with that. We have to have a balanced program. Where we find egregious conduct—not just in noncompliance with safety laws, but with child labor laws, or with other statutes—that those cases where there are criminal remedies are pursued. We need to have everybody in the system understand that we are going to pursue criminal sanctions. But we have to do a better job of educating employers as to what their responsibilities are. We also have to worry about the victims of these particular unlawful activities. We need to to recover unpaid back wages, for instance, which can be done only by a civil case. Sometimes a criminal case will keep these victims waiting for their back pay for 5, 6, 7 years while the criminal case is pursued. So you have to find the right balance to find the most effective enforcement.

Senator ROTH. Let me ask you this question, 2 or 3 years ago, or maybe it is longer now, we passed the civil enforcement procedures, because there has been great concern, and rightfully so, that too often criminal prosecutions didn't take place, partly because they are so expensive and require so many personnel to process successfully. So we enacted a law that provides for civil penalties, a much simpler process.

Has that been useful in any way in the question of preventing fraud?

Mr. DAVIS. Senator, my office has responsibility for those cases, and from my observation, and I think Mr. Maria would agree with it—I think the IG is doing a terrific job and that we work very closely with him—and I do think it is making a very positive difference. It really allows us to go off with the IG quickly to get penalties, assess those penalties and deter abuse. So my initial read on it is, yes.

Senator ROTH. I would like to have submitted for the record what actions have been taken as a result of that legislation.

Mr. DAVIS. I will be glad to do that, Senator.

Senator ROTH [presiding]. Senator Pryor, do you have any questions?

Senator PRYOR. Senator Roth, I have no questions.

Senator ROTH. Rod, we want to thank you and your colleagues for being here. We appreciate your testimony, thank you very much.

Mr. DEARMENT. Thank you very much.

Senator ROTH. At this time I will ask for panel 2, Kevin Moley, the Assistant Secretary for Management and Budget, Department of Health and Human Services, who will be accompanied by Michael J. Astrue, who is General Counsel of the Department of Health and Human Services.

Mr. Moley, Mr. Astrue, it is a pleasure to have you here today The Chairman will be here in just a few minutes, but I would ask you to proceed with your opening statement.

TESTIMONY OF KEVIN E. MOLEY, ASSISTANT SECRETARY FOR MANAGEMENT AND BUDGET, DEPARTMENT OF HEALTH AND HUMAN SERVICES, ACCOMPANIED BY MICHAEL J. ASTRUE, GENERAL COUNSEL

Mr. MOLEY. Thank you very much, Senator. I have a rather lengthy prepared statement [1] which has been given to the Committee. I would like to waive reading of that. I understand how important the questions you have for us are. I would, however, just like to take a moment to refer back to Inspector General Kusserow's testimony of October 3rd of last year when he spoke in respect to the Federal Managers Financial Integrity Act.

At that time he indicated that there was considerable reluctance in the Department of Health and Human Services to come forward with material weaknesses and, in fact, in fiscal years 1987 and 1988 only 8 and 13 material weaknesses were presented in that process. In a department as large as the Department of Health and Human Services, over 110,000 people, expected expenditures of $464 billion, clearly there are more problems than 8 or 13 in any given year.

In fact, this past year we have reported some 24 material weaknesses, and I can assure this Committee that in future we will probably be reporting even more material weaknesses. The fact is that we regard this process as one in which we are asking our managers to be proactive, to come forward with problems in order that they might be fixed. We recognize that, in respect to the problems that were uncovered at HUD, it is not enough simply to come forward with the problems. They not only have to be brought out, they cannot be forgotten. So it is our intention, and we have the full support of Secretary Sullivan and Under Secretary Horner, to find problems and not forget them but to fix them.

On that note, Senator, Chairman, I would be welcome to have your questions. I think Mr. Astrue has a statement.

Chairman GLENN. Mr. Astrue.

Mr. ASTRUE. Thank you, Mr. Chairman, I do have a brief statement to make.

Mr. Chairman, thank you for providing the Department of Health and Human Services with an opportunity to testify here today. The Department believes that there are few duties more important than protecting the safety of the American public through the vigorous enforcement of the Federal Food, Drug and Cosmetic Act. We spend considerable time and energy trying to improve our enforcement efforts, and we are currently conferring with the Office of Management and Budget on a major legislative proposal designed to strengthen our enforcement efforts. In addition, the

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[1] See p. 107.

Secretary has created an advisory Committee to assist him in improving and strengthening the FDA. This Committee will be chaired by Dr. Charles Edwards, a former FDA Commissioner and Assistant Secretary for Health and will be composed of equally distinguished members.

The Department did not expect the Secretary's July 24, 1989 delegation of certain criminal authorities to be a controversial part of its efforts to address forcefully the problems in the generic drug evaluation process. At the time, we viewed the delegation as essentially a continuation of principles of FDA-IG cooperation, as reflected in the January 1989 agreement signed by Commissioner Young and Inspector General Kusserow. As concern about generic drugs mounted, we wanted to be sure that we had taken every possible step to ensure the integrity of the process.

Shortly after the delegation was signed, officials at the Department of Justice raised concerns about the delegation. These concerns provoked a series of discussions about the legality of the delegation and then a series of discussions in which we discussed ways in which the Justice Department would manage these investigations.

When the Department was advised that the Department of Justice was not committed to defending the delegation, we became concerned that the delegation would undermine its original purpose—the swift and effective investigation and prosecution of wrongdoers. Moreover, the Secretary believed that the delegation could be withdrawn at that time without damaging the integrity of or public confidence in the generic drug evaluation process. He had at the time been assured that the FDA had determined that the safety problems were not of the magnitude previously feared and that the Justice Department stood ready to take whatever steps were required for effective enforcement of the law. Accordingly, the Secretary concluded that the only responsible decision was to withdraw the delegation.

On December 28, 1989, Secretary Sullivan withdrew the delegation, effective January 29, 1990. Since that time, the Inspector General has referred about 53 cases to the Justice Department's Office of Consumer Litigation, and has withdrawn from about 45 joint investigations, most of which involved either the FBI or the Customs Service. In addition, he is preparing to refer up to 40 cases to the Department of Justice. It should be noted, however, that most of these cases do not involve generic drugs, but rather illegal distribution of steroids, illegal distribution of counterfeit drugs, or violations of the Prescription Drug Marketing Act.

To date, the Department of Justice has referred 2 of these cases back to the FDA for additional investigation and evaluation. We anticipate that the Justice Department will refer additional cases to the FDA and to the Inspector General, and that it will also devote substantial investigative resources of its own to many of these cases.

Mr. Chairman, I have concluded my prepared remarks and will be happy to respond to your questions.

Chairman GLENN. Very good. Mr. Astrue, this recommendation of delegation of felony investigative authority to the IG was recom-

mended by you, the IG, and then FDA Commissioner Young; is that correct?

Mr. ASTRUE. Yes, Mr. Chairman.

Chairman GLENN. Did any of these officials ever invite the Justice Department to give an opinion or pass judgment on the legality of that delegation?

Mr. ASTRUE. Not to my knowledge, Mr. Chairman.

Chairman GLENN. Without that request, did the Department of Justice just invite itself in to give that opinion?

Mr. ASTRUE. I was contacted by the Department of Justice relatively shortly after the signing of the delegation. I am not sure of the exact time frame, but I would say within about 10 days.

Chairman GLENN. Well, we had assurances that the legal opinion limiting the Labor Department IG would not be applied across the board. Did they ever make comment on that, on their promises to us that this was going to be for DOL only?

Mr. ASTRUE. Well, strictly speaking, I think the March 9 opinion does apply only to the Department of Labor. We took that position, and I think it is clear—I believe it is Footnote 13 of the OLC opinion—that it explicitly kept open HHS issues. Certainly part of our thinking was that the opinion did not, strictly speaking, apply to HHS.

Chairman GLENN. Has your department come under pressure from OMB to go along with the Justice Department views on delegation?

Mr. ASTRUE. Not to my knowledge, Mr. Chairman. My understanding is that there was relatively minimal contact with OMB. I, myself, did not speak to OMB on this issue until fairly recently.

Chairman GLENN. Well, we were told that a senior person over at OMB had told another senior HHS official—I won't put names to these—that the HHS was not being a team player and not going along with Justice; is that your opinion of what happened?

Mr. ASTRUE. My understanding is that we got general encouragement to resolve this issue from various White House and OMB officials. Any time there is a disagreement before departments, I think it is a matter of legitimate concern.

Chairman GLENN. Is it your opinion that Secretary Sullivan did what he should have done in this case?

Mr. ASTRUE. Yes, I agree with Secretary Sullivan's decision.

Chairman GLENN. What is his attitude now? You may not be able to speak for him. I guess I should ask him, but is he unrepentant about this? I will put it that way.

Mr. ASTRUE. Well, certainly Secretary Sullivan believed at the time that he signed the delegation that he was doing the right thing. I believe also at the time that he withdrew the delegation, he also believed he was doing the right thing.

Secretary Sullivan's only interest in this matter is to try to ensure the most effective enforcement of the Federal Food, Drug and Cosmetic Act. Clearly, in order to enforce the Act we need the cooperation of the Department of Justice, and we are currently reexamining the situation.

Chairman GLENN. Do you feel that delegation was unlawful?

Mr. ASTRUE. Clearly, I advised the Secretary on or around July 20th of 1989 that it was not unlawful.

Chairman GLENN. Well, I agree with you, and yet that is the way the thing is being interpreted now.

In your view, now must the IG seek approval to proceed from the Justice Department in every case?

Mr. ASTRUE. No, it is not my view that he has to seek the approval of the Justice Department to proceed in every case. It is not my understanding that it is the IG's view that he is legally required to do so. However, it is my understanding, given the fact that he has some confusion as to what the Justice Department's views are on the scope of his authority, as a matter of prudence, he is referring all but the most clear cut cases over to the Justice Department.

Chairman GLENN. Let's set up just a little scenario. Let's say we have an Inspector General and he has someone he wants to subpoena. The defense attorney argues the IG isn't authorized to subpoena his client's documents based on the Justice Department legal opinion. In fact, this situation has already occurred, as you are probably aware, in a Medicare secondary payer case.

Now, in cases like that is the IG going to have to go to Justice and get an approval for a subpoena in every case?

Mr. ASTRUE. No, I don't think that he is going to have to get approval for a subpoena in every case. However, in cases——

Chairman GLENN. What would be your counter argument to a defense attorney who says to the IG that he isn't authorized to subpoena his client?

Mr. ASTRUE. My advice to a defense attorney?

Chairman GLENN. No, your advice to the IG who has a defense attorney who tells him, you can't serve a subpoena on my client.

Ms. ASTRUE. Clearly we are trying to work with the Department of Justice to only proceed in cases in which the Department of Justice will be prepared to defend our actions if they are challenged, and that's an ongoing process now.

Chairman GLENN. And do it in a way in which they will defend you, which they have said they would not do if you violated what they said should be done, right?

Mr. ASTRUE. We are checking with them very carefully on all these categories of cases, yes.

Chairman GLENN. Did Mr. Barr at the Justice Department tell your department that it must pull the delegation pursuant to the OLC opinion?

Mr. ASTRUE. Mr. Barr and a variety of Justice Department officials did advise the Department that they thought it appropriate to pull the delegation. Strictly speaking, they didn't say that the March 9 opinion was definitive in terms of our Department. However, clearly, the type of analysis that they brought to bear in the March 9 opinion was similar to the analysis that was reflected in the views that they expressed to us.

Chairman GLENN. Did this carry along with it the implication that if your people got in trouble that DOJ, Department of Justice, would not defend them?

Mr. ASTRUE. Yes, I believe so.

Chairman GLENN. That is pretty good coercion, I would say.

What rationale did Justice give? What reasons? Why did they want the delegation pulled?

Mr. ASTRUE. Mr. Chairman, they indicated that they didn't feel that the Secretary by means of that delegation could provide the Inspector General with any additional legal authority.

Chairman GLENN. Well, that is where I just fall apart on this whole thing. I cannot understand the Department of Justice, that is supposed to be out there rooting out all these things, I just don't see yet why they don't welcome what the IGs are doing in this regard and back them up instead of trying to hamstring them. I know they still have their nose out of joint over there because we put an IG into the Department of Justice last year and that irritated everybody, so maybe this is their way of trying to get back at us with the IG law, I don't know.

But it is very disconcerting when we have IGs who I think basically across the length and breadth of Government over the last 11 years have basically done a very, very fine, admirable job. They have done a tremendous job, and I would think Justice would want to support them instead of trying to hamstring them.

Senator Roth.

Senator ROTH. Well, Mr. Chairman, I have to say that with all due respect, I think there is a serious question as to what can and should be delegated to the IG. I think it depends in part as to what one views to be their principal task. Now, basically—and I am not this familiar, I regret to say, with the case, so I may be going over something that has already been said—but essentially the Secretary delegated to the IG what responsibility?

Mr. ASTRUE. Authority to conduct criminal investigations under certain provisions of the Federal Food, Drug and Cosmetic Act. Primarily it covers four types of cases; fraud in the drug or device approval process, enforcement actions under the Prescription Drug Marketing Act, enforcement actions under the statute forbidding distribution of counterfeit drugs, and also illegal distribution of anabolic steroids.

Senator ROTH. And ordinarily it would be the responsibility of who to make those investigations to ensure compliance with that law?

Mr. ASTRUE. Senator, as a general matter, it has been the responsibility of the Food and Drug Administration. Historically there has been some Inspector General involvement in this area. This level of involvement was increased in response to a 1987——

Senator ROTH. So does that predate the independent IG? Is that what you are saying?

Mr. ASTRUE. The authority—well, at least one of those statutes is fairly recent, the Prescription Drug Marketing Act is quite recent. And there was much less of a problem in some of these other areas prior to enactment of the original IG legislation.

I don't think anabolic steroids were the problem 15 years ago that they are now.

Senator ROTH. I guess a basic concern that I have as an original author of the IG Act is that the intent of the IG was to oversee the work of the agency to ensure that it was done appropriately and fully. Now, my concern here—and I am not sure, Mr. Chairman, where I am going to ultimately come down—but my concern here is that if the IG, itself, does the investigation, then there is nobody

within the agency to oversee that work, if I understand what you are saying.

In other words, the purpose of creating the independent IG was to ensure that we had an independent voice to overview what the agency was doing, and that if it wasn't doing adequate work it would be reported to the Congress.

Now I am concerned we are beginning to mix the two purposes by asking them to do the investigation, itself. I am not clear in my mind who is going to then make that independent check of the IG. You are falling right back into the trap of the reason we wanted an independent IG.

Mr. ASTRUE. Senator, the IG, under the authority of the Inspector General Act, already conducts a substantial number of investigations on behalf of the Department: misuse of program dollars, cases of misconduct by employees, misuse of program grants. The Inspector General already has a substantial investigative role in the Department. I think we viewed this as a relatively small addition to that responsibility in the context of his overall activities.

Senator ROTH. In that case, you are investigating the conduct of other employees?

Mr. ASTRUE. Well also, though, people receiving program dollars. And I don't know what the numbers are on that, but the Inspector General has a substantial role in investigating people guilty of Medicare fraud and other types of misconduct involving the use of Federal dollars.

Senator ROTH. Well, I think the Chairman is right in being concerned that these may be falling in a crack that nobody is investigating them. I guess the question I have is should these be delegated to the IG, and if so, are we beginning to lose the independence which is such an important part of the IG? In other words, they are overlooking what the agency does, but if they begin doing the work of the agency—and it is hard to draw the line, I understand that, but I think, Mr. Chairman, this is something that we really ought to take a very careful look, because I think it is a critical problem.

Mr. ASTRUE. I agree, Senator Roth. I think it is a serious problem and I think it is something that we would encourage you to take a hard look at.

Senator ROTH. I have no further questions, Mr. Chairman.

Chairman GLENN. We have a Presidentially appointed, Senate confirmed Secretary in every Department, and they come in and they want to do a good job and they are dedicated on their watch, if it is only 22 months, as I said before, they are going to do the best job that ever came down the pike in Washington, D.C. And then they want to do certain things and they want to have their IG look into certain things, and I tell you to go look into this.

And then the Justice Department, of all places, wheels in and says, no, you can't do that, under some little nicety of law. And I still have a feel that this is more connected with our putting an IG into Justice than anything else. Maybe I am wrong, but this whole thing has baffled me here. I just don't see why the Justice Department wouldn't be supporting it completely.

Are you aware, Mr. Astrue, that Mr. John Fleder of the Justice Department's Office of Consumer Litigation told the IG office in

January that their continued work on these cases placed IG agents at risk of personal liability? Are you aware of that?

Mr. ASTRUE. Yes, the Inspector General has told me that.

Chairman GLENN. What is your reaction to Mr. Fleder's statement?

Mr. ASTRUE. Clearly, if the Inspector General is exceeding his authority in his actions, there is some risk of *Bivens*-type actions, and clearly the Inspector General has a legitimate interest in protecting his employees from those types of suits.

Chairman GLENN. Mr. Moley, if the Secretary tells the IG to do something, do you think that is exceeding the authority?

Mr. MOLEY. No, sir.

Chairman GLENN. I don't either.

Senator ROTH. Mr. Chairman, let me demur from that, because, as I said, I think we have to look very carefully what the purpose of creating the independent IG was. I would seriously object to the Secretary being able to delegate things that would enable the IG to take over tasks that they were supposed to overview. What worries me is what you are destroying, if improperly used, and I am not saying this is my conclusion. But what I want and what I thought I was creating years ago with an independent IG is that their essential task was overview—to ensure that the agency, itself, was complying with the law and preventing fraud, waste, and abuse.

Now, to what extent it should be proper for the Secretary to utilize it for making the actual investigations is a serious question. And as I said, I keep an open mind on that, but I would look with great concern if I felt it was undermining their independence. Because if the IG is making these investigations, who is going to overview the IG?

Chairman GLENN. Well, I would respond—I know we are on Senator Pryor's time here, but I will get to him in just one second here—but I would say you used the key words. He overviews to make sure there isn't fraud, waste and abuse, to use the Senator from Delaware's words. And that is exactly what we are into. We are into fraud, waste and abuse investigations and the Department of Justice says don't do it, you can't go into that. That is what bothers me here.

I agree we have to look into this. We could debate this ourselves here before everybody all morning here, but I agree we have to look into it and clarify it, and that is the main thing.

Senator ROTH. Very good, Mr. Chairman.

Chairman GLENN. Senator Pryor.

Senator PRYOR. Mr. Chairman, thank you. I hope that my series of questions will be relevant to this subject, it does involve SSA, if I could talk about some oversight there.

Let me go back, if I might, Mr. Chairman, to a GAO report issued in September, 1987. I would like to read from a section entitled "Uncredited Earnings, Effect of Benefits," page 4. I will read one sentence: "GAO found that three of every five individuals with uncredited earnings faced the possible loss of monthly Social Security benefits averaging $17."

You are familiar with this issue I think.

Mr. MOLEY. Yes, I am, Senator.

Senator PRYOR. Now, I am not quite through with setting the groundwork here. My big concern is that uncredited earnings are going to drastically affect the benefit amounts that people are earning now. It will subtract from those ultimate benefits because of what I think of as a bureaucratic morass.

I also have an Inspector General's letter from Mr. Kusserow dated February 2 of 1990 to Gwendolyn S. King, Commissioner of Social Security. This is kind of mind boggling to me, Mr. Chairman. I quote from the second paragraph: "Approximately $240 remain in unresolved wage differences for tax years 1978 through the present."

The Inspector General asked Ms. King to respond to this allegation within 30 days. I don't know if that response has been given. We have a tremendous amount of money collected through FICA taxes, which is not credited to the individual's earnings account.

The law requires that HHS certify the amount in its trust funds based on its own records. Currently, HHS is keeping track of this money, according to our information, based upon not their own records, as required by law, but the records of IRS. I think not only is there a violation of the law, I think that there is a very serious problem in resolving these cases. 2.5 million cases are still pending for the tax years 1984 to 1987. I would like your comments on this matter.

Mr. MOLEY. Senator, this was reported by us as one of the 4 high-risk areas, and consequently, obviously, is a subject for today's discussion. To put it in context, specifically, if I might deal first for the $240 billion number. That reflects cases in which the IRS has recorded more in wages than SSA has. It is a gross figure. The net figure we believe to be more accurate, still a very large figure, is $50.6 billion.

Senator PRYOR. In other words, there is $51 billion being collected but not being credited to the individual's account?

Mr. MOLEY. It may be overcredited or undercredited. Let me suggest that this problem, as you may know, results from a 1978 statute which decoupled wage reporting for IRS purposes, which is done on a quarterly basis, from reporting of earnings to SSA, which began to be done then on an annual basis. Prior to that time, prior to 1978, Senator, the reportings to IRS and to SSA were both done quarterly based off of the same information, so this problem had not arisen.

As a result of that change in the statute, what we then developed since 1978 is these discrepancies. They were are not dealt with, quite frankly. They were first reported in 1987 and by virtue of a memo of understanding between IRS and SSA dated July 12 of 1988, in fact we have been able to reconcile for the periods from 1978 through 1984.

We expect to have reconciled by October of this year, by October 1990, all the way through to tax year 1988. I might also add that the number you are using of $240 billion reflects some estimates, obviously, because we don't have information as yet current on——

Senator PRYOR. That is the Inspector General's number, that is not my number. I am reading from his letter.

Mr. MOLEY. Correct, his number, indeed it is. The Inspector General's number does have some estimates for tax years 1988—excuse

me, for 1989 and 1990. Having said that and having further said that we are going to be current through tax year 1988 in October of 1990, we will always have an amount that is unreconciled by virtue of that original decision putting the statute to decouple the earnings report done to IRS on a quarterly basis, done to SSA on an annual basis. And that is as a result, of course, by virtue of different kind of reportings result from mergers, acquisitions, people going out of business, people coming into business, employee or identification numbers changing, and a whole number of different elements that go into this situation.

Senator PRYOR. All right, the bottom line question: how is this affecting that wage earner out there on his or her ultimate benefits, not having these funds credited to their account?

Mr. MOLEY. We don't think it does, Senator, and the reason why we don't think it does and the reason why we disagree with the $17 figure that was used by the GAO, GAO would, I believe, admit that their sampling was somewhat skewed. It is based on some 33 cases identified which were identified as reflecting egregious reporting errors before there was a reconciliation effort taking place. We have, A, moved to reconcile the numbers through 1984. We will have reconciled the numbers through 1988. We also have available to individual Social Security beneficiaries the added security of having their personal earnings and benefit statements available to them upon request, and based on legislation that has already been passed, that will be mandatorily available to them in future years.

Senator PRYOR. Now, you stated that we are going to get this all corrected by October of this year?

Mr. MOLEY. Yes. And I don't want to overstate the case, Senator. We are going to correct through tax year 1988 by October 1990, but as I said, by virtue of this decoupling of the reporting which previously IRS and SSA up until 1978 got the same information and received it at similar times, received it quarterly, when we decoupled that we in fact created a situation where there are always going to be a certain amount of unreconciled dollars by virtue of that decoupling.

Senator PRYOR. All right. I won't argue my point since you are saying you are going to correct this by October. Let me mention this information from an employee from Baltimore—I have an affidavit, I won't reveal the name—a lead claims clerk at the Social Security Administration Office of Central Records, in the Division of Earnings, Eligibility and Accounting:

> Sometime in January 1990 all work prior to 1988 was removed from the work area. This work was packed in boxes and moved to another part of the building. The work consists of employers reports which may have thousands of employees wages involved. We were instructed not to process any work prior to 1988. The work in the boxes included employer's reports for the years 1986 and 1987. As of March 5, 1990, there were 31 pallets of work.

Now, I don't know if you know what a pallet is——

Mr. MOLEY. Sure do.

Senator PRYOR [continuing]. But that is something——

Mr. MOLEY. It is bigger than a bread box.

Senator PRYOR. Much bigger than a bread box. In fact, it has to be picked up by a forklift. So there were 31 of those. There are not enough employees to process this work by October, 1990. If this

work is not processed, it may affect many future Social Security recipients.

Do you have a comment on that affidavit?

Mr. MOLEY. Senator, let me first ask my colleagues from SSA if they have any knowledge of this. I certainly don't as of this moment, but let me just check on that.

[Brief pause.]

Mr. MOLEY. Senator, I would strongly recommend that you provide that information to our Inspector General. If that is correct, that represents a problem of which I am not currently aware and I will make every effort and work with the Inspector General to assure that if what you are so stating and what that individual employee is stating is correct, that it is redressed immediately. That is not the intention of this Department to sweep anything under the rug.

Senator PRYOR. Well, Mr. Chairman, I think in a few days I am going to make a trip to Baltimore and look for myself. I am going to see exactly what is going on, because I truly believe—and I say this in all respect—I think we are sweeping a problem under the rug. When we sweep a problem of this magnitude under the rug, we are talking about the wage earnings of millions of Americans out there who have no idea whether their FICA taxes have been correctly credited to their accounts.

Mr. MOLEY. Senator, if in fact this information is accurate, your concern is no greater than ours. We would very much appreciate working with you on this. We do not want, and do not want to be perceived, to be doing anything that negates the significance of that kind of a problem.

Senator PRYOR. Thank you, sir. Thank you, Mr. Chairman.

Chairman GLENN. Thank you, Senator Pryor.

I referred earlier to Justice Department's Office of Consumer Affairs Litigation informing the IG office in January that to continue to work on a case placed IG agents at risk of personal liability, and I asked questions about that. Your testimony notes that the Justice Department promised that FBI resources will be devoted to these cases.

What evidence have you seen to show that the Attorney General has requested these cases be an FBI priority? Has there been any discussion of that?

Mr. ASTRUE. Yes, Mr. Chairman. I spoke with Secretary Sullivan this morning about this matter and he informed me that he had spoken personally with the Attorney General and that the Attorney General had assured him that he would vigorously follow up on all of these cases.

Chairman GLENN. Well, have FBI agents actually been assigned to investigate the cases?

Mr. ASTRUE. My understanding is that the Attorney General also informed the Secretary that there will be a full report imminently on exactly how the Justice Department is handling these cases, and it is my understanding that they will be bringing FBI resources to bear on the problem.

Chairman GLENN. Do you have criminal investigators assigned to FDA now?

Mr. ASTRUE. We have a number of investigators, but we do not have the GS/GM 1811 series that I think generally is referred to in this context.[1]

Chairman GLENN. Does your legislative proposal under discussion with OMB include a request for criminal investigative personnel to be hired directly by FDA?

Mr. ASTRUE. Mr. Chairman, the legislative proposal that was sent to OMB, I believe it was about 6 weeks ago, did not include a request for that authority. However, we are now considering that actively in light of the rescission of the delegation and may ask OMB to approve an amendment to the proposal.

Chairman GLENN. Senator Pryor.

Senator Pryor. I have no further questions, Mr. Chairman.

I would just like to say that I think this hearing is so timely. I want to thank you for holding it, because the matters that you are bringing up are a revelation to me. It is a whole area that I was certainly not aware of. In fact, I was not aware about the Social Security issues until about a week ago.

Thank you, Mr. Chairman, for having this hearing.

Chairman GLENN. Mr. Astrue, we will be holding future hearings on the IG Act and IG operations. I read the Inspector General Act to authorize the IGs to hire and supervise their own attorneys and other personnel if they so choose. I think that is very clear. I understand that you have assigned people to the IG's office. How would you handle that? Would you handle that by a permanent transfer to the IG's office of those lawyers presently assigned by you to him?

Mr. ASTRUE. Mr. Chairman, currently all the attorneys advising the Inspector General are Office of General Counsel attorneys reporting directly to me. We have, I believe, an office that is at least twice as large as the next largest group of attorneys assigned to Inspector General activity. The Inspector General has raised with me the issue of the organizational arrangement of the attorneys, and we are currently having discussions on it. I think it is a question that is complicated by the fact that the Inspector General and a number of his enforcement activities does represent the Secretary pursuant to delegations.

Chairman GLENN. Well, when you have your lawyers assigned over there and they are doing work for the IG, they do it under his direction, I presume; is that correct?

Mr. ASTRUE. No, Mr. Chairman, they are under my direction. Historically, I believe about half of the Inspector Generals have attorneys that report to the General Counsel of the agency and about half have attorneys reporting directly to the IG.

Chairman GLENN. In your case, how many independent attorneys then does the IG have?

Mr. ASTRUE. He has none.

Chairman GLENN. He has none?

Mr. ASTRUE. He has lawyers on the staff who function in a nonlegal capacity.

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[1] See p. 142 for a letter sent to Chairman Glenn.

Chairman GLENN. What is his staff compared to the number of people that you provide him?

Mr. ASTRUE. I believe that he has about 1,300 employees. I would defer to Kevin, but I think that is the right order of magnitude.

Mr. MOLEY. That is very close.

Chairman GLENN. That are independent, that he has hired?

Mr. ASTRUE. Right, 1,300 employees, approximately.

Chairman GLENN. Okay. And the number of people you would have assigned to him would be how many?

Mr. ASTRUE. I have 16 attorneys assigned to the IG Division, plus support staff.

Chairman GLENN. Good. Just a couple of other areas. Some of these areas have already been covered to some extent.

To follow-up a little bit on Social Security, Senator Pryor was bringing this down to the individual's concerns, and I agree with that. And I would ask, how should individuals go about asking for their personal earnings statements, Social Security, can they get them?

Mr. MOLEY. Yes, sir. In fact, 7 million citizens have already asked for them. There is legislation that will require it to be distributed in future years, but in fact we have a 1-800 number to Social Security. We have, obviously, a large number of Social Security offices, as well as, of course, writing directly to the SSA in Baltimore.

Chairman GLENN. A couple of questions on Medicare secondary payer. Can we afford to wait until the end of the 2-year computer matching program recently authorized by Congress to fix this billion dollar a year problem?

Mr. MOLEY. No, we can't, in fact.

Chairman GLENN. What are we going to do about it?

Mr. MOLEY. Initially, in conversations with the Health Care Financing Administration, in dealing with what we believe is about a billion dollar problem, Mr. Chairman, we think the computer match with IRS and SSA will save us some $400 million to $600 million of that. And in fact, we will probably be asking for authority to continue that. As you know, that expires at the end of fiscal year 1991.

Having said that, that still leaves anywhere from $400 million to $600 million out there. Initially, it was believed prudent to go ahead with this match and wait to see how effective that was before taking any further action. But I had a conversation with the new administrator of the Health Care Financing Administration just yesterday, Dr. Gail Wilensky, who, as you may know, has just recently been confirmed. And we are going to be exploring other alternatives towards trying to recoup a greater amount of that $400 million to $600 million that is still laying out there.

There may come a point where it doesn't become cost effective to get down to the last dollar, but I would suggest an amount in the range of $400 million to $600 million still is leaving plenty of money——

Chairman GLENN. That is not the last dollar, even by Washington standards.

Mr. MOLEY. Even by Washington standards, Senator.

Chairman GLENN. If that present matching program, as you indicated, expires in 1991, we do need legislative action if—and it is a question mark right now—if the program works. And you indicate that you are looking at some other options if it doesn't.

Can you share with us any views on that as to what new approaches or other new legislation might be needed? Are we far enough along for you to give advice to us on that yet?

Mr. MOLEY. Well, preliminarily, Mr. Chairman, we believe we would have to match against not only our insurance, our fiscal intermediaries, who are insurance companies who pay claims on behalf of the Health Care Financing Administration—and interestingly enough, although we got a provision in over 1989 which gave us this matching authority, another provision, 6202D, prohibited us from requiring a computer match between the fiscal intermediaries with whom we do business and their own private business.

We would probably need, going beyond that, the authority to match against employers, many of whom, as you know, are self-insured, so they aren't dealing with an insurance company. Consequently, there may be a fairly significant paperwork burden involved there that I think we want to be very careful about before coming forward with proposed legislation to you.

Chairman GLENN. Okay. We want to assess the program now too.

I note that the recent legislation authorizes a private cause of action for double damages where a primary insurer fails to provide for its required payment or appropriate reimbursement.

Has HHS drafted regulations or issued guidance on this provision to encourage this enforcement mechanism?

Mr. MOLEY. Mr. Chairman, I am not aware that we have. I can certainly get back to you very quickly on that regulation.

Chairman GLENN. Fine, if you would provide that for us we would appreciate it.

Thank you very much, both of you. Obviously we are very interested in these areas and want to follow-up on them, and we want to work as closely with you as we can.

If you need help, let us know. We just want to make it the most efficient operation we possibly can do, as you do too. That is our objective.

Mr. ASTRUE. Thank you, Mr. Chairman.

Mr. MOLEY. Mr. Chairman, may I just mention one thing?

Chairman GLENN. Sure.

Mr. MOLEY. We obviously have been talking about material weaknesses that we have uncovered by virtue of the way the program runs currently. I think it is timely to forewarn, however, that the Congress had before it a piece of legislation in the last session that I am sure will come back, and that is in regard to making SSA an independent agency. I think it is very poorly understood by the Congress and many others about how closely linked SSA is with other departments, other areas of the Department of Health and Human Services, specifically Medicare. And I would strongly recommend that if it ain't broke don't fix it. By that I mean Medicare and other services to the elderly are very, very dependent on SSA offices and other services that are provided in close coordination, and currently the Secretary serves as an umbrella to assure that those links are maintained. I think we would have considerable dif-

ficulty—as a matter of fact, I think we would have a huge problem that we would be back to you on discussing next year with respect to material weaknesses if that legislation were to go forward, sir.

Chairman GLENN. The problem here isn't so much SSA, it is how it is handled within the budget, as you know. It is not an attempt to change SSA in any way. The problem has been that the SSA surplus now is masking the Federal deficit, which it is. Everyone knows that.

Now, what people here are grappling with, me and my staff included, is is there any way, short of taking it off budget, to get, quite honestly, honesty in budgeting, because that is what it is. When we include all of these trust funds on budget—and it is not just Social Security—I think if we are going to take it off, my opinion is we should take off the Airport and Airway Trust Fund, the Highway Trust Fund, all of the earmarked funds. These Funds are supposedly in a trust fund, and yet because we work with a unified budget, the Administration won't spend the money that is dedicated for that cause because it shows up as a bigger bottom line deficit. We are all familiar with the problem.

Now, how do you correct this and get some honesty into budgeting, that is the question.

Mr. MOLEY. I agree, Senator. I am just suggesting that having said that, we would hope that that didn't lead to another action which would then decouple SSA from these other entities, including specifically the Medicare program with which they are so closely linked, because I think enormous problems would be created that really haven't been given the appropriate consideration.

Chairman GLENN. Well, your words of warning are well taken, and I think before we move to any off-budget action legislatively we should heed those words and make sure we are not fouling up more than we are curing here. But it is a major, major problem right now, because we have all these Gramm-Rudman-Hollings things that we are saddled with, and Social Security funds which we turn right around and put those into Government securities, which in effect means that we are loaning it to the Government. Sometime we have to pay that loan off; about the time when the Social Security funds are needed we will have enormous tax increases to redeem that Government paper, enormous.

Mr. MOLEY. And any of those changes, Mr. Chairman, could be made absent taking SSA out from under the umbrella of the Department and making it independent.

Chairman GLENN. Yes, you are right, those obligations are going to occur whether it is on or off-budget. That is correct. I agree with that.

Mr. ASTRUE. Mr. Chairman, I would also like to add, there are many linkages between the Title XVI program and Medicaid, the Title II program and Medicare, a number of interrelations. As a former employee of Social Security, I know it is very helpful to have all those types of policy decisions ultimately decided by one head, because we do have uniformity. There are other programs which should have, I think, more uniformity and consistency, and I know there has been a frustration in the Congress that they don't.

And I think those kinds of disconnections have been aggravated by the fact that they are housed in different agencies. For instance,

Congress frequently points out that there should be more uniformity between the AFDC program and the Food Stamp program, and I think if all of a sudden the Social Security Administration were to be severed, it would be a real problem in terms of the consistency of a number of the policies, which is not the case now.

Thank you.

Chairman GLENN. There are all sorts of novel approaches being thought up by people on some of these things. Do you take some of this money and instead of putting it into Government paper, put it into infrastructure, highways and bridges and all sorts of things, which are investments the country has to make eventually anyway. Because then you reduce the amounts of infrastructure money you have to have in the future. So in some ways it at least in part balances off your requirements into the future when you are going to have to buy this paper back, if you follow that.

So it is a very difficult problem, and it is one I think we have to address this year. We can't go on without it. We have added $2 trillion in national debt and going for $3 trillion in addition to the one we had starting 10 years ago, and I have thought for a long time we just can't let that go, we have to make a decision. But your words of warning are good and we will heed those, thank you.

The hearing will stand in recess subject to the call of the Chair.

Thank you.

[Whereupon, at 12:05 p.m., the Committee adjourned subject to the call of the Chair.]

APPENDIX

STATEMENT OF
RODERICK A. DeARMENT
DEPUTY SECRETARY OF LABOR
U.S. DEPARTMENT OF LABOR
BEFORE THE
COMMITTEE ON GOVERNMENTAL AFFAIRS
U.S. SENATE

March 8, 1990

Mr. Chairman and Members of the Committee, my name is Roderick A. DeArment. I am the Deputy Secretary of Labor.

I am pleased to appear before you today to discuss areas of concern in the management of the Department of Labor and the programs the Department administers. These areas of concern, as noted in your letter inviting the Department to participate in this hearing, have been identified by the Department in our 1989 Financial Managers Financial Integrity Act (FMFIA) Report, and in lists of high-risk areas prepared by OMB and GAO with the Department's assistance.

The Department is proud of its FMFIA process. The Department's Internal Control Policy Board has over the past several years been highly successful in identifying management control problems at the Department of Labor (DOL). Then, as part of our FMFIA process, the DOL Internal Control Policy Board closely tracks corrective actions needed to address problems

identified. The Department's Inspector General serves on the Board, and I am pleased to report that the Inspector General has always been able to sign off and agree to Board activity and reports.

Since Secretary Dole and I arrived at the Department, I have requested that the Assistant Secretary for Administration and Management, Thomas C. Komarek, and the Inspector General meet with me each quarter to review corrective actions in all areas to make certain they are on track.

In your letter of invitation, you identified five areas of concern. I would like to briefly report on each of those five areas.

I. JTPA Management Problems

The Job Training Partnership Act (JTPA), which is administered by the Employment and Training Administration (ETA), is designed to provide training and employment services to the disadvantaged and unemployed. Enacted in 1982, it replaced the Comprehensive Employment and Training Act as our major program of job training assistance to these individuals. JTPA represented a major shift in national employment and training policy and philosophy. It provides state governments with substantially increased authority and responsibility while narrowing the role of the Federal government. JTPA also emphasizes the need for an

active partnership with the private sector, places the primary focus of JTPA activities on the training function, encourages closer coordination between employment and training service deliverers, and incorporates a major program of service for dislocated workers. The JTPA program is funded at $3.9 billion in 1990, about three-fourths of which is provided to the states in grants to operate training and employment programs at state and local levels.

JTPA funds are allotted to the states by a formula based largely on the states' relative numbers of unemployed individuals. Under the Title II Block Grant and Summer Youth programs, most of the funds are further allotted within the state by the Governor. Using a formula similar to the state allotment, funds are distributed to service delivery areas comprised of units of local government which act as the employment and training agent at the substate level. The service delivery areas provide policy guidance and oversight through local Private Industry Councils comprised of representatives of the private sector, labor, education, and other interested elements. Under the Title III Economic Dislocation and Worker Adjustment Assistance Program, the Governor distributes most funds within the state based on six factors of relative need specified in the Act. In 1990, it is estimated that 1.7 million individuals will be assisted through JTPA.

Last year the Department took action to address a problem in the use of fixed unit price, performance based contracts that caused JTPA cost accountability problems. To address this cost accounting issue, new guidelines in this area were published on March 13, 1989. Training of Federal and grantee staff and Federal monitoring to correct the problem also were initiated. To address the need for a long-term strategy, the Department included provisions to strengthen fiscal accountability in the bipartisan JTPA amendments currently before the Congress as S.543. The legislation will require more explicit accounting of costs. The Department of Labor is continuing to work with the Inspector General in the hope of resolving issues within the Congressional debate in a manner which effectively resolves this matter, while maintaining what the Department believes are the positive benefits of fixed unit price contracting.

Another problem in JTPA management is adequate audit coverage of JTPA funds under the Single Audit Act. More than $2.8 billion of JTPA funds are ultimately expended by State and local governments or their recipients. The Single Audit Act provides that state and local jurisdictions receiving Federal funds will generally be subject to only a single Federally sponsored audit of those funds. The problem for JTPA and other smaller Federal grant programs is that sometimes only the larger

Federal programs are covered in the single audit and thus JTPA funds are not covered in some cases. We noted this problem in our report to OMB of high risk areas in DOL programs.

To improve audit coverage of JTPA funds, we are developing a full analysis of deficiencies. As the first step in this process, the Department's Inspector General will be completing a review of this issue in June. At the conclusion of that review, we will determine what actions should be taken to address this issue and forward any needed recommendations to OMB for action.

II. Inadequate Financial Systems

Both the Comptroller General and the Administration have placed a high priority on replacing outmoded financial systems. Moreover, our Inspector General pointed out a number of significant accounting and internal control gaps in DOL's Integrated Accounting System (IAS). As a result, the Department is taking action to replace the IAS that failed to meet Treasury and GAO accounting standards with a new system, called the Department of Labor Accounting and Related Systems (DOLAR$), which will meet GAO and Treasury standards. It is an off-the-shelf commercially developed accounting system that has been previously implemented successfully at ACTION and Secret Service. The Department of Health and Human Services is also planning to use this same system.

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After testing DOLAR$ last year, the Department began implementation this year. Obviously with the installation of a new, complex accounting system, there are a number of unanticipated difficulties that have to be overcome. We have produced interim DOLAR$ first quarter, FY 1990, reports for DOL managers and the Treasury for our salary and expense accounts. We hope to have usable DOLAR$ reports for our grant accounts by April 30. When all subsystems are completed the Department will have a vastly improved accounting system that meets and exceeds all Treasury and GAO requirements. The DOL Inspector General's Office has worked closely with Assistant Secretary Thomas Komarek on the development of DOLAR$ to date and future plans will be closely coordinated with that office.

Unemployment Insurance Trust Fund State Accounting Systems

All State Unemployment Insurance (UI) systems except Puerto Rico use experience rating for the regular UI program. Experience rating is a variation in tax rates in relation to individual employer "experience with unemployment". The primary overall economic goal of experience rating is to stabilize employment by providing employers an incentive to reduce turnover through assigning lower tax rates to employers with reduced employee layoffs.

7

The Office of the Inspector General (OIG) has conducted two audits in connection with experience rating. In the second audit, published in draft in late 1989, the Inspector General concluded that State UI accounting systems were not adequate and that 26 systems did not even maintain a general ledger for their Unemployment Trust Fund transactions. The Inspector General recommended that the Emplcyment and Training Administration (ETA): (1) assist the State Agencies in improving their accounting systems; (2) instruct States to fully account for both employer and socialized cost elements of experience rating; (3) perform a complete evaluation of Federal reporting requirements to ensure an integrated reporting structure; and (4) provide support to upgrade State accounting system automation.

The Employment and Training Administration (ETA) responded to the draft report by being generally supportive of the OIG findings for improvements in State Employment Security Agency (SESA) trust fund accounting systems. ETA agreed that the general ledger system proposed by the OIG is one model or prototype to offer States for their consideration and agreed to transmit the model system to States with a program letter. ETA further agreed to evaluate current reporting requirements during the periodic report justification period to OMB. ETA will encourage States to automate their general ledgers and integrate their tax and benefit functions.

B

The Inspector General, in his final report, agreed with ETA's immediate actions. The Inspector General also recognizes that considerable time will be required to correct many of the deficiencies found. However, OIG considers all findings unresolved until the Unemployment Insurance Service (UIS) provides:

(1) a long range plan to implement and monitor general ledger systems;
(2) a system to provide support for experience rating;
(3) a plan to evaluate all Federal reports; and
(4) a comprehensive plan and administrative funding to automate general ledger systems.

The Department has not yet responded to the Final Report, because we are still assessing the proper scope of our efforts in this area and what it is possible to do within the constraints of the federal/state relationship, available resources, and other variables affecting state accounting systems. Within these constraints, ETA will offer technical assistance to SESAs to improve their trust fund accounting systems.

III. ADP Procurement

The Department has made strides in improving its Information Resources Management (IRM) procurement process in recent years.

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In the early eighties, DOL agencies operated many incompatible ADP systems and GSA had cited the Department for inadequate IRM oversight. In order to correct these situations, a multi-staged IRM procurement process was implemented. Also, in 1988, the Department developed and issued its Information Technology Architecture 2000 (ITA 2000) policy together with revised ADP planning requirements. These changes strengthened the IRM oversight function and provided the basis for a common office automation environment. Additional management processes planned for implementation this fiscal year will provide the basis for improved ADP procurement and information resources management in the years ahead. These processes include more stringent review of agency budgetary requests of IRM initiatives and more evaluation reviews of ongoing and new agency IRM programs.

IV. Evaluation of Civil and Criminal Enforcement by DOL Program Agencies

Secretary Dole has directed that the Department of Labor undertake a comprehensive review of the Department's enforcement efforts, and identify ways of strengthening what is already a first rate enforcement program. The Secretary's directive fulfills commitments that she made during her confirmation hearings, and which she has reconfirmed in transmitting to Congress the OIG's semiannual reports in May and November 1989. The Department's enforcement review has become even more timely

because of the Department of Justice's recent opinion regarding the scope of the authority of the Labor Department's OIG.

At the request of the Secretary, I am heading the Department's enforcement review. This review commenced in July 1989, and will be completed this year in late spring or early summer. At the outset, the Department recognized that a thorough and comprehensive review would be difficult and time consuming. We concluded then, and want to reconfirm today, that we will not sacrifice quality in order to achieve a more expedient but less comprehensive result. The enforcement review will include a comprehensive assessment of the program agencies' current enforcement efforts and a final report to Secretary Dole that includes recommendations and enforcement strategies, coordinated on a Department-wide basis, for each enforcement program agency.

To assure a comprehensive evaluation, and recognizing that enforcement involves many interrelated aspects of each enforcement program agency's operations, we focused on a broad range of factors. These factors included: (1) civil and criminal priorities; (2) uniformity and avoidance of regional disparity; (3) the measurement of enforcement efforts based on qualitative and quantitative criteria; (4) employee performance standards and whether proper incentives are provided for qualitative enforcement efforts; (5) the agency's relationship with the OIG, coordination of efforts between the agency and the OIG, and the efficient sharing of relevant information between the agency and the OIG; (6) the agency's relationships with the Office of the

Solicitor and the Department of Justice, including the United States Attorneys; (7) whether the agency's enforcement priorities are considered in rulemaking and in conformity with the agency's overall legal strategy; and (8) the allocation of resources among various enforcement programs for agencies with more than one enforcement program.

We have made significant progress in the Department's review, and completed a number of important actions, including:

-- initiation of the enforcement review focusing on the enforcement program agencies (ESA and its component parts, the Wage and Hour Division and the Office of Federal Contract Compliance Programs, ETA, MSHA, OLMS, OSHA and PWBA);

-- a comprehensive evaluation by the Office of the Solicitor of the agencies' current enforcement efforts;

-- An assessment by the enforcement program agencies of their current civil and criminal enforcement efforts, and recommendations for improvements; and

-- The Offices of the Solicitor and the Assistant Secretary for Policy currently are reviewing the agencies' assessments and recommendations.

There still are several significant steps that need to be taken for the Department to conclude its evaluation of these enforcement matters. These steps include:

-- The analysis of the enforcement program's initial assessments and recommendations by the Offices of the

Solicitor, the Assistant Secretary for Policy, and my office;

-- Thereafter, each enforcement program agency's Assistant Secretary or program head will discuss these issues with the Solicitor, Assistant Secretary for Policy, and me. The enforcement agencies then will be asked to prepare an enforcement strategy, in addition to improving their enforcement programs.

-- The Offices of the Assistant Secretary for Policy and the Solicitor then will provide an initial analysis of "cross-cutting" issues, such as matters affecting several enforcement agencies including information sharing and enforcement coordination, and dealings with the OIG, the Department of Justice and other enforcement agencies.

-- Enforcement program agencies prepare revised enforcement strategies. Additional review by the Offices of the Assistant Secretary for Policy and the Solicitor, and consultations with the OIG and other federal enforcement agencies including the Department of Justice and the FBI.

-- Submission to me of the draft Departmental report, accompanied by recommendations for the enforcement program agencies' enforcement strategies.

-- The revised report will be considered by the Department's Policy Review Board for recommendation to

the Secretary, because the report and the recommendations and strategies contained therein will have Department-wide effect.

The review of the enforcement responsibilities of the Pension and Welfare Benefits Administration (PWBA), which, along with the PBGC and the Treasury, has primary responsibility for enforcement of the Employee Retirement Income Security Act of 1974, as amended (ERISA), should be completed first, before the review of the other enforcement program agencies is completed. As discussed below, the Department has undertaken a number of initiatives to address the concerns of our Inspector General relating to our ERISA enforcement responsibilities. The enforcement initiatives taken by PWBA will be fully considered, and if necessary modified, when the Department's final comprehensive report is completed.

The Department is proud of its comprehensive enforcement review and its ongoing enforcement efforts. We are convinced that this enforcement review will strengthen what already is a first rate enforcement program at the Department of Labor.

V. Departmental Initiatives to Improve ERISA Enforcement

ERISA, as you know, was enacted to protect the retirement income and welfare benefits of the nation's private sector workforce. Presently, 76 million Americans are covered by more

than 900,000 pension plans and 4.5 million welfare plans. Altogether, ERISA plans hold over $1.8 trillion in assets, with ERISA pension plans holding $1.7 trillion. Under ERISA, the Secretary of Labor is charged with the responsibility of protecting these assets on behalf of participants and beneficiaries.

Before I begin my discussion of the Department's ERISA enforcement efforts, I would like to take a moment to reassure the nation's workers and retirees that the pension system is sound. Recent reports from our Inspector General and the press have questioned the safety and integrity of the pension system. We welcome this scrutiny and agree that we must be vigilant in enforcing the law. The Department is currently implementing several of the Inspector General recommendations. We are considering whether legislation is necessary to implement others. However, Secretary Dole and all of us at the Department are concerned that people may misunderstand and unnecessarily be alarmed about the security of their pension benefits. The pension system has, by any objective measure, never been healthier. We have seen no evidence of widespread and systematic fraud and abuse of benefit plans and are committed to ensuring that this situation continues.

This is not to say there is no room for improvement. There certainly are people who are negligent or indifferent in performing their fiduciary duties and there are some people who will abuse, embezzle from, and perpetuate fraud against plans. For this reason we must be vigilant in the enforcement of ERISA. As wrongdoers find new and more sophisticated ways to commit fraud and abuse, we have to find new and more effective ways to protect employee benefit plans. Secretary Dole and the Pension and Welfare Benefits Administration (PWBA) are absolutely committed to protecting the integrity of the private employee benefit system, and we have undertaken a major ERISA enforcement effort to insure that retirement benefits are secure.

On January 29, it was announced in the President's budget that we will be seeking 100 new PWBA positions for civil and criminal enforcement of ERISA, a 33 percent increase in our enforcement staff. This represents the largest increase in PWBA enforcement positions since ERISA's enactment and will greatly enhance our ability to enforce ERISA. The Department is also seeking a substantial increase in legal staff to litigate the additional cases that will result from this staff increase. This major increase in staff is concrete evidence of the Administration's commitment to strong and effective enforcement of ERISA.

In addition, the Department is giving serious consideration to recommendations by the Office of Inspector General concerning ERISA enforcement in general. In response to those recommendations, the Department is reviewing proposals regarding the work of independent public accountants ("IPAs") who audit employee benefit plans. Proposals under review by the Department include repealing the limited scope audit exception, ensuring that financial audit procedures are designed to detect and disclose violations of ERISA, and requiring peer review of IPAs' work. We are committed to completing this effort by March 15th.

Furthermore, PWBA has undertaken a number of other enforcement initiatives. For example, an Office of Chief Accountant was established within PWBA in 1988 to work with the accounting profession to improve employee benefit plan accounting, audit procedures and practices. A process has been established under which PWBA refers substandard accounting work to the AICPA for disciplinary action. A new computer database system has been created that will enhance our ability to effectively target employee benefit plans with the highest potential for ERISA violations.

In addition, the Department is currently reviewing various options for increasing private civil enforcement of ERISA with a view to determining whether any cost effective means can be devised to assist private plaintiffs in bringing civil actions.

It is still too early to tell what recommendations, if any, will be made in this area.

VI. Summary

We at the Department of Labor, working with our Inspector General, have identified high risk areas such as those discussed this morning in our annual FMFIA review process. We are working aggressively to address each of them, and are tracking progress through our FMFIA reporting system. With the concerted efforts of DOL program agencies and our Inspector General, I feel confident that we will minimize or eliminate any actual problems or financial loss.

JOHN GLENN, OHIO, CHAIRMAN

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United States Senate
COMMITTEE ON
GOVERNMENTAL AFFAIRS
WASHINGTON, DC 20510-6250

April 3, 1990

Mr. Roderick A. DeArment
Deputy Secretary of Labor
Department of Labor
200 Constitution Avenue, N.W.
Washington D.C.

Dear Mr. DeArment:

I would like to take this opportunity to thank you for your testimony at the March 8, 1990 hearing on high-risk management problems of the Department of Labor. I would like the Department to respond to these follow-up questions:

1. At the hearing you expressed the view that by any objective measure, our pension system has never been healthier. What is your view on the soundness and integrity of multiple employer health benefit arrangements, known as Multiple Employer Trusts and Multiple Employer Welfare Arrangements? What is the Department doing in response to charges of serious fraud and abuse in these arrangements?

2. In your statement you expressed your hope to have useable DOLAR$ reports for DOL grant accounts by April 30, 1990. Please provide this Committee with a progress report by May 15, on DOLAR$ implementation status.

3. As the current Solicitor of the Labor Department, on what legal or policy grounds do you base your decision that the Office of Legal Counsel's March 1989 opinion is binding on the Department of Labor? How do you reconcile your view with that of your predecessor, George A. Salem, as expressed in his November 29, 1986 letter to DOJ's Mr. Keeney:

> "Again, I do thank you for notifying us of OLC's views on the matter but as the Department's representatives stated at the July 11 meeting, we view the memorandum as an internal Justice Department opinion which has no binding effect on the Department of Labor." (Copy of Mr. Salem's letter attached)

4. As the current Solicitor, do you agree with that part of the March 1989 Justice Department opinion concerning the Labor OIG that the Secretary of Labor cannot delegate her own criminal investigative authority to the IG? If so, as a policy matter, why shouldn't the Secretary be able to delegate it to anyone she thinks can do the job?

5.(a) As the current Solicitor, on what legal basis do you justify directing the Inspector General to conduct criminal investigations of Black Lung cases? Will you be sending an inquiry to the OLC concerning the IG's authority to investigate Black Lung cases?

(b) The IG has testified that since its inception in 1978, the IG conducted fraud investigations in programs not always directly funded by the Department of Labor. Among these were claimant and provider fraud under the Federal Employees Compensation Act and the Black Lung Program, unemployment insurance claimant fraud and criminal violations of the Federal Longshore and Harbor Workers statute. Is there any legal analysis which would allow you to find a federal dollar or federal employee nexus in <u>each</u> of these programs as well?

(c) The IG testified that in 1986 he began criminal investigations in the areas of employee benefit plans, worker health and safety, and Federal wage and hour statutes. Can you find a federal dollar or federal employee nexus in each of these programs as well?

6.(a) For each of the following programs or agencies, please identify whether the statutory language governing each program or agency specifies which DOL officers or employees should undertake criminal investigations as part of the regulatory or enforcement mission, and if so, identify the specified officers or employees:

OSHA
Mine Safety and Health Administration
Pension and Welfare Benefits Administration
Employment Training Administration
Employment Standards Administration
Office of Labor-Management Standards

(b) How many criminal investigators (1811s) are currently employed in each of the programs listed in (a) above?

(c) How many criminal investigator (1811) positions are requested in the FY 91 budget and how many will be requested in the FY 92 budget for each agency or program listed above?

7. What kind of criminal investigative and other training do inspectors or other enforcement personnel receive, and exactly how does that compare (citing similarities and differences) to the training that SEC employees with similar duties get?

8. During the period of the Department's study of its enforcement activities, has the Department referred any criminal cases to the DOJ for prosecution or investigation? If so, please identify under separate cover the referring agency or program, date of referral, nature of allegation, and its current status.

If you have any questions or comments, please have your staff contact Lorraine Lewis or Robert McArter at 224-4751.

Sincerely,

John Glenn

John Glenn
Chairman

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U.S. Department of Labor

Solicitor of Labor
Washington, D.C. 20210

NOV 24 1986

Honorable John C. Keeney
Deputy Assistant Attorney General
Criminal Division
U.S. Department of Justice
Washington, D.C. 20530

Dear Mr. Keeney:

Thank you very much for providing me with a copy of (1) the Memorandum of Understanding between the Federal Bureau of Investigation and the Office of Labor Racketeering and (2) the opinion of the Office of Legal Counsel (OLC) concerning the scope of Section 805(b) of the Comprehensive Crime Control Act of 1984. Regarding the latter, I am somewhat puzzled by the fact that the opinion was issued on August 29, but the Department of Labor was not afforded a copy until you transmitted it on October 15. I would hope that any future document which purports to have such a direct bearing on the activities of this Department would be made available in a more timely fashion.

In addition, I would bring to your attention a misstatement on page 1 of the OLC opinion that states, "The Labor Department has not supplied us with any memorandaum addressing these questions." In point of fact, the Department of Labor provided the Department of Justice with two pieces of correspondence on this issue, dated April 1, 1985 and December 3, 1985. If copies were not made available to you by OLC, I would be pleased to furnish them to you. Further, I would note that three attorneys from this Department met with representatives of your Department on July 11, 1986 to discuss the issues.

As for the substance of the OLC opinion, let me state that the Department of Labor is not persuaded by the arguments presented therein. We continue to believe that the controversial language of the statute, "other related Federal laws," is broader than the limitation OLC would place on it, namely incorporating only those specific laws related to the administration of welfare benefit plans and pension funds.

Further, I find somewhat confusing the OLC treatment of views expressed in a letter dated November 18, 1985 from Senators Nunn, Roth, Chiles, Rudman, Hatch, and Nickles. These Senators, who, I would point out, drafted the statutory language in question, stated that Section 805(b) was intended to extend

Labor's authority to all areas of labor-management relations. The Senators' views were dismissed by OLC with the statement on page 3, "While the Senators' observations merit close study and careful consideration, this post-enactment expression of views is not part of the legislative history of section 805(b) and cannot control its meaning." The confusing element is that OLC, at the top of page 7, relies in part on the post-enactment interpretation of the Office of the Law Revision Counsel. This Office is responsible for the codification of laws, not interpretation. However, OLC appears to give much credance to this post-enactment interpretation while not affording the same to the statements of the drafters as to their very specific intent.

Again, I do thank you for notifying us of OLC's views on the matter, but as the Department's representatives stated at the July 11 meeting, we view the memorandum as an internal Justice Department opinion which has no binding effect on the Department of Labor.

I have raised this matter with the Deputy Attorney General, who will soon be meeting with the appropriate Department of Labor officials regarding this and other outstanding matters. We hope that these meetings will produce the sort of cooperative atmosphere which resolution of this matter will require.

Sincerely,

George R. Salem

cc: Deputy Attorney General Arnold Burns
Senator Sam Nunn
Senator William Roth
Senator Lawton Chiles
Senator Warren Rudman
Senator Orrin Hatch
Senator Don Nickles

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U.S. DEPARTMENT OF LABOR

DEPUTY SECRETARY OF LABOR
WASHINGTON, D.C.
20210

MAY 31 1990

The Honorable John Glenn
United States Senate
Washington, D.C. 20510-6250

Dear Senator Glenn:

In response to your request for a status report on the implementation of the Department of Labor Accounting and Related Systems (DOLAR$), I am writing to inform you that the Department has made some progress in establishing this new family of accounting and financial systems. In that process we have enhanced our ability to manage our resources effectively as well as protect them from misuse.

When we spoke with you and your committee in early March, there were five outstanding concerns with our new system:

- Lack of receipts data. Data on two types of receipts began being input into DOLAR$ in late April. The first type of receipts are those that are "reusable" and are credited to departmental funding sources. The second are those that are "unusable" by the Department but are credited to Treasury general funds. The backlog of data on such receipts is scheduled for elimination within a few weeks.

- Lack of grants data. We had hoped to have all grants data reflected in departmental reports at this time, and we have succeeded except for Employment and Training Administration (ETA) grants. The FY 1990 opening balances and the first month's transactions for ETA grants were entered into DOLAR$ before May 4; however, the accuracy with which the system processes the data still needs verification. We are now reviewing reports using this data and expect to enter the remainder of the backlog on an accelerated basis between now and the end of July.

- Incomplete internal reports. With completion of the April accounting cycle on April 30, we began generating on a timely basis the management reports that had been identified as critical by the Department's program users. In addition to ledger reports needed for internal control and external reporting, there are DOLAR$ reports that display the current status of obligations, payables, undelivered orders and expenditures, sorted, summarized and displayed in various ways to meet management needs.

--- GOV'TL AFFAIRS 2005

- Incomplete external reports. Reports required by Treasury and the Office of Management and Budget are now being prepared regularly by the system or will be prepared with the implementation of the revised schema. At the present time, pending the elimination of the backlogs of receipt and ETA grants data cited above, system-generated data must be supplemented by manual entries, but we expect that by the time June reports are due, DOLAR$ will create these reports in their entirety automatically.

- Compliance with accounting standards. The core system we initially implemented represented a significant improvement over what the Department had previously, notably in its use of the Standard General Ledger and its security, but we recognized that some enhancements were needed to its production environment before DOLAR$ would fully meet Federal accounting standards. We are now engaged in a joint effort with the Office of the Inspector General (OIG) to test and implement that new environment. This is scheduled for completion in early June, after which the OIG intends to test the system's ability to produce auditable financial statements. The experience to date with this cooperative endeavor has been very positive, and we are fully confident that by the time the OIG completes its work, all open questions about conformance to standards will be resolved.

In summary, the implementation of DOLAR$ has not been completed and our effort is slightly behind the projection given to you and your staff several months ago. DOLAR$ now contains over 1.2 million accounting transactions, but lacks some receipt and grants data to be fully current. That data -- perhaps 40,000 transactions -- is in the process of being input with completion scheduled for the next few weeks. Due largely to its superior edits, the data in the system is remarkably accurate, with only about one-tenth of one percent of FY 1990 transactions requiring correction.

It is my intention to provide you with another status report on DOLAR$ before the first of August. I will forward to you soon, under separate cover, responses to the additional follow-up questions set forth in your letter to me following your Committee's March 8, 1990 hearing on high-risk management problems at the Department of Labor. In the meanwhile, should your staff have any questions, please have them contact the Comptroller for the Department, William R. Reise, 523-6891.

Sincerely yours,

Roderick A. DeArment

DEPUTY SECRETARY OF LABOR
WASHINGTON, D.C.
20210

June 6, 1990

The Honorable John Glenn
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

As requested in your April 3, 1990, letter, enclosed are our responses to your follow-up questions pertaining to our testimony on high-risk management problems of the Department at the March 8, 1990, hearing of your Committee. The Solicitor's Office has answered those questions that you addressed to our current Solicitor, Robert P. Davis. The progress report on the DOLAR$ implementation status was provided to you under separate cover on May 31, 1990.

If we can provide any further information to you, please do not hesitate to contact my office.

Sincerely,

Roderick A. DeArment

Enclosure

QUESTION. At the hearing you expressed the view that by any objective measure, our pension system had never been healthier. What is your view of the soundness and integrity of multiple health benefit arrangements, known as Multiple Employer Trusts and Multiple Employer Welfare Arrangements? What is the Department doing in response to charges of serious fraud and abuse in these arrangements?

RESPONSE. In addition to your March 8 hearing, Assistant Secretary of Labor for Pension and Welfare Benefits David George Ball testified on this subject before the Senate Labor and Human Resources Committee on March 6, 1990, and before the Senate Permanent Subcommittee on Investigations on May 15, 1990. Multiple Employer Trusts (METS) and Multiple Employer Welfare Arrangements (MEWAs) are health benefit arrangements that may be particularly susceptible to abuse. Stated most simply, METs or MEWAs are group trusts used to fund health benefit plans, typically for small employers. These arrangements are often marketed at premium rates that are substantially below rates for comparable coverage from insurance companies, and are thus especially attractive for smaller businesses who find it very difficult to obtain an affordable program for their employees.

In concept, these arrangements would appear to fill an important void in health care availability. In practice, they are too often seriously underfunded and, therefore, unable to pay claims. In the worst situation, they are run by individuals who deplete the assets through extraordinarily high fees and outright embezzlement.

METs and MEWAs seek to avoid regulation by state insurance authorities regarding such matters as required reserves and contributions. They do this by claiming that they are plans covered by the Employee Retirement Income Security Act of 1974 (ERISA) and that ERISA's broad preemption provisions prohibit states from imposing such requirements. The fact is, in the more than 15 years since ERISA's enactment, it has been extraordinarily rare for the Department to find a MET to be an employee benefit plan immune from state insurance regulation because of ERISA's preemption provisions. Furthermore, Congress amended ERISA in 1983 to make it clear that states are free to regulate these programs under their insurance regulations without the risk of ERISA preemption.

Secretary Dole is committed to developing an effective state and Federal strategy for dealing with MEWA abuse. She has recently written all state insurance commissioners outlining a six point program for coordinating state and Federal enforcement activities and for assisting the states in their enforcement efforts. As part of this program, the Department is preparing technical assistance and "plain English" materials to be given to state

insurance departments explaining the roles of the Department and the states with respect to MEWAs. We are expediting the processing of MEWA-related Advisory Opinion requests by state agencies. Finally, we are expanding the sharing of information with state enforcement agencies and insurance commissioners in matters related to MEWAs.

This is an area where the Department is seeking to enhance its enforcement efforts. The Department has proposed that these entities be required to file registration statements. This requirement will provide significant assistance to state insurance departments in policing these trusts. This should also benefit small employers and their employees who are the victims of unscrupulous promoters of METs/MEWAs.

Question. As the current Solicitor of the Labor Department, on what legal or policy grounds do you base your decision that the Office of Legal Counsel's March 1989 opinion is binding on the Department of Labor? How do you reconcile your view with that of your predecessor, George A. Salem, as expressed in his November 29, 1986 letter to DOJ's Mr. Keeney:

> "Again, I do thank you for notifying us of OLC's views on the matter but as the Department's representatives stated at the July 11 meeting, we view the memorandum as an internal Justice Department opinion which has no binding effect on the Department of Labor." (Copy of Mr. Salem's letter attached)

RESPONSE. At the outset, I would like to note that I am not addressing the specific legal effects of Office of Legal Counsel (OLC) opinions. Rather, I am talking about specific Department reactions to two different OLC opinions involving different circumstances. Mr. Salem's view related to one kind of situation while my view relates to a different situation.

The OLC opinion that Mr. Salem was speaking about concerned the criminal investigative authority of the Department of Labor under section 895(b) of the Comprehensive Crime Control Act of 1984 (codified as part of Title I of the Employee Retirement Income Security Act of 1974 (ERISA)). That OLC opinion was issued to, and at the request of, the Criminal Division of the Department of Justice. Mr. Salem's comments were made in the context of possible further discussions of the OLC opinion with a higher level of the Justice Department.

I believe that the situation under which Mr. Salem made his comments is very different from the one involving the OLC opinion on IG authority. Regarding the issue of the authority of the

Inspector General (IG), the Department has no particular expertise in, or responsibility for, interpreting the Inspector General Act. In addition, because no principal agency is charged with the interpretation of the Inspector General Act, the Department of Labor believed it was appropriate to seek the opinion of the Office of the Legal Counsel. Thus, I consider the Department of Labor bound by the March 9, 1989, OLC opinion regarding the investigative authority of the Inspector General.

QUESTION. As the current Solicitor, do you agree with that part of the March 1989 Justice Department opinion concerning the Labor OIG that the Secretary of Labor cannot delegate her own criminal investigative authority to the IG? If so, as a policy matter, why shouldn't the Secretary be able to delegate it to anyone she thinks can do the job?

RESPONSE. On legal grounds, the OLC opinion concluded that regulatory investigative authority, that is, the authority to conduct investigations pursuant to regulatory statutes administered by the Department, could not be delegated by the Secretary to the Inspector General under section 9(a)(2) of the Inspector General Act (IG Act). Section 9 (a)(2) authorizes the Secretary to transfer additional functions to the Inspector General but only if they are "properly related" to the functions of the Inspector General and would "further the purposes of this Act." This section also specifically forbids the transfer of "program operating responsibilities" to the Inspector General.

The OLC opinion found the conduct of regulatory investigations by the Inspector General to be inconsistent with the structure and purpose of the IG Act. Therefore, it concluded that the delegation of such authority could not be found to be "properly related" to the Inspector General's functions nor could such a delegation be said to "further the purpose of the Act." The Solicitor's Office agrees with this legal analysis.

As a policy matter, we believe the OLC opinion recognized the very important underlying principles of the IG Act. Those principles are objectivity and independence. The opinion noted that the purpose of creating an Inspector General was to have an official in the Department who would not have responsibility for the operations of the Department and would thus be free to investigate and criticize the operations of the Department. The opinion noted that the IG could not perform his function to criticize regulatory investigative policy if it is his responsibility to set and implement that policy. Furthermore, to authorize the Inspector General to conduct regulatory investigations would institutionalize a duplicative and confusing enforcement structure. Generally, the enforcement

activities of the department are planned and directed by the Secretary or the program agencies and involve difficult policy decisions. A separate agency pursuing its own enforcement priorities with respect to the very same program would add uncertainty, confusion, and complication to program enforcement.

We believe the Inspector General has a critical responsibility to serve as a "watchdog" over the operation of Federal programs. The Inspector General's efforts are important in identifying problems with agency activities, including law enforcement functions, and in prodding the agency to take proper steps to correct any problems identified. We regard the Inspector General as an important resource in the Department's enforcement efforts. In our view, however, the goal of effective law enforcement is best served by the Inspector General's continuing his current role of diligent oversight of the Department's law enforcement programs.

QUESTION. (a) As the current Solicitor, on what legal basis do you justify directing the Inspector General to conduct criminal investigations of Black Lung cases? Will you be sending an inquiry to the OLC concerning the IG's authority to investigate Black Lung cases?

RESPONSE. On March 6, 1990, the current Solicitor of Labor, Robert P. Davis, stated in a memo to Acting Inspector General Raymond Maria his view that investigations of fraud involving Black Lung Disability Trust Fund by the Office of the Inspector General (OIG) were permissible under the March 9, 1989, Office of Legal Counsel (OLC) Opinion. Mr. Davis based his position on the fact that the Black Lung Disability Trust Fund consists of funds which are derived from special taxes paid to the Treasury and from repayable advances from the Treasury. Monies for certain benefits and administrative expenses are then appropriated from the Fund to the Department of Labor. The OLC opinion does not preclude the OIG from investigating fraud involving monies appropriated to the Department of Labor. Mr. Davis stated that because he believed that the OLC opinion was clear in this area, and that delays in investigations would be unfortunate, he did not believe it was necessary to seek a clarification from the OLC.

On April 5, 1990, the OIG requested DOJ clarification with regard to the authority of OIG to conduct Black Lung criminal investigations. Shortly thereafter, the Solicitor's Office sent to OLC a detailed explanation of the Black Lung program and some specific questions about the extent of OIG investigative authority in the Black Lung area. On April 19, 1990, the OLC informed Mr. Maria that the OIG could conduct criminal

investigations of certain alleged fraud in obtaining money from the Black Lung Disability Trust Fund. The OLC also stated that this conclusion applies in a case where the Fund initially pays benefits for which an operator later reimburses the Fund. The question of whether the OIG may investigate alleged fraud where the payment is directly from an operator and not from the Fund is still pending before the OLC.

QUESTION. (b) The IG has testified that since its inception in 1978, the IG conducted fraud investigations in programs not always directly funded by the Department of Labor. Among these were claimant and provider fraud under the Federal Employees Compensation Act and the Black Lung Program, unemployment insurance claimant fraud and criminal violations of the Federal Longshore and Harbor Workers statute. Is there any legal analysis which would allow you to find a Federal dollar or Federal employee nexus in <u>each</u> of these programs as well?

RESPONSE. We should state at the outset that Federal employees are involved in the administration of all these programs. It is undisputed that the Inspector General has the authority to investigate both alleged misconduct and instances of fraud, waste, and abuse by Federal employees.

In the Federal Employees' Compensation Program (FECA), there is a Federal dollar connection. FECA benefits are paid by the Department of Labor from a designated fund in the Treasury. This fund is financed by payments from every agency each year for benefits paid on behalf of their employees during the preceding year, as well as money appropriated directly to the Employees' Compensation Fund. Agencies obtain the money to make these payments through their own appropriations process or funding mechanism.

In the Black Lung Program, there is also a Federal dollar connection with regard to benefits paid from the Black Lung Disability Trust Fund. The Black Lung Disability Trust Fund consists of funds which are derived from special taxes paid to the Treasury and from repayable advances from the Treasury. Monies for certain benefits and administrative expenses are appropriated from the Fund to the Department of Labor. There are also, however, claims paid exclusively by responsible coal mine operators or their insurers. Recipients of Black Lung benefits in uncontested responsible operator cases do not receive Federal funds.

With regard to unemployment insurance, there are a number of different programs. There are several entirely Federally financed unemployment benefit and allowance programs, which are

administered by the States for the Federal government, under agreements with the Secretary of Labor. These programs include unemployment compensation for Federal employees and for ex-servicemembers. The Department pays from Federal funds amounts to the States equal to the benefits paid under these programs. The Department also pays for the costs of the States' administration of these programs.

There is also the Federal-State Unemployment Compensation Program under which regular unemployment (UI) benefits are provided to unemployed workers through a state-operated system under the general oversight of the Federal government. The financing of this system is very complex.

Federal revenues are used to provide grants to the States to cover the costs of the administration of the State programs. It is undisputed that the Inspector General could investigate allegations of fraud and abuse by state employees in connection with these administrative grants. In addition, employers in the States are given a partial credit on their Federal Unemployment Tax for payments of State taxes to the States' unemployment funds.

States finance their UI benefits from State unemployment taxes on employers. These funds are required to be deposited in a separate State account in the U.S. Treasury, and may only be spent by the State for the exclusive purpose of paying unemployment benefits. In addition, the receipts and expenditures of these funds are counted as part of the unified Federal budget. Advances are provided to insolvent State accounts when necessary to pay benefits. These advances are recovered either through State repayments or automatic reductions in the credit given to the States' employers on their Federal Unemployment Tax.

We would note that in a recent Ninth Circuit opinion, United States v. Facchini, 874 F.2d 638 (9th Cir. 1989), the Court held that Federal criminal liability under 18 U.S.C. 1001 could not be imposed on claimants who made misrepresentations on applications for regular State unemployment benefits. It based this holding on its finding that 1) no Federal money goes to pay regular UI benefits and 2) the Federal role in a State unemployment insurance program is limited to monitoring the administrative structure of the State program, not its actual operation.

Finally, extended benefits, up to 13 weeks in addition to the regular 26 weeks of unemployment benefits, are paid by a State in times of high unemployment. The Federal government reimburses the States for 50 percent of the cost of the actual extended benefits.

In the Longshore and Harbor Workers' Compensation Program, liability for payments of benefits is in most cases assessed directly against the employer or its insurance carrier. In second injury claims, that is, those cases where an employment related injury covered by the Longshore Act combines with a manifest pre-existing permanent disability to render the employee more seriously disabled than he would have been from the job injury alone, benefits are paid by a Special Fund established by the Longshore Act. The Special Fund contains no appropriated funds and the law specifically states that monies in the Fund shall not be money or property of the U.S. (33 U.S.C. 944(a) and (b)).

There are only a small category of claims in the Longshore Program which involve Federal money. Section 10(h) of the Longshore Act provides special funding arrangements for the initial and subsequent annual adjustments in compensation for permanent total disability or death from injuries which occurred prior to the 1972 amendments to the Longshore Act. Fifty percent of these 10(h) payments are paid by the Special Fund and 50 percent are paid with DOL appropriations.

QUESTION. (c) The IG testified that in 1986 he began criminal investigations in the areas of employee benefit plans, worker health and safety, and Federal wage and hour statutes. Can you find a Federal dollar or Federal employee nexus in each of these programs as well?

RESPONSE. Again, we should state at the outset that Federal employees are involved in the administration of all these programs. It is undisputed that the Inspector General has the authority to investigate both alleged misconduct and instances of fraud, waste, or abuse by Federal employees.

With regard to private employee benefit plans regulated by the Department under the Employee Retirement Income Act of 1974 (ERISA), there is no direct Federal dollar nexus. These plans are privately funded. Certain defined benefits pension plans, however, are covered under the termination insurance program administered by the Pension Benefit Guaranty Corporation (PBGC). The PBGC insures payment of benefits when a covered plan terminates with assets insufficient to provide those benefits. Covered plans are required by law to pay a premium that is the PBGC's major source of revenue. Thus, the PBGC is by statute a self-financing wholly owned Government Corporation within the Department of Labor. It should be noted that the PBGC has its own Inspector General.

With regard to worker safety and health, the Department administers the Occupational Safety and Health Act (OSHA). OSHA imposes on private employers the duty to furnish a safe workplace and to comply with the safety standards promulgated by the Secretary of Labor. The Department also administers the Mine Safety and Health Act (MSHA) which governs safety and health conditions in all underground and surface mines. Apart from some specific grant programs, private employers covered by OSHA or MSHA do not receive Federal funds under these Acts.

With regard to Federal wage and hour statutes, the Department administers the Fair Labor Standards Act (FLSA). FLSA requires that a fixed minimum wage be paid to any covered employee, as well as imposing other regulatory requirements, such as overtime compensation. Covered individuals do not receive Federal funds under the FLSA.

The Department also administers wage and hour statutes applicable to certain Federal contractors and certain federally assisted projects. One example of this type of statute is the Davis-Bacon Act. The Davis-Bacon Act is applicable to all contracts of the U.S. in excess of $2,000 for construction, alteration, or repair of public buildings or public works. The Act requires that all laborers and mechanics employed by a covered contractor must be paid the prevailing wage, as determined by the Secretary of Labor. Clearly, Federal funds are involved in these cases, though, these funds are rarely Department of Labor monies.

With regard to Davis-Bacon investigations, we would note that the March 9, 1989, OLC opinion relating to Inspector General authority stated that "investigations of contractors outside the Department of Labor seem akin to regulatory investigations because they are unrelated to waste and fraud in the operations of the Department of Labor itself or among its employees, contractors or grantees." Opinion, Footnote 16. OLC, however, expressly left open the question of the authority of the Inspector General to conduct investigations in the Davis-Bacon area.

QUESTION. (a) For each of the following programs or agencies, please identify whether the statutory language governing each program or agency specifies which DOL officers or employees should undertake criminal investigations as part of the regulatory or enforcement mission, and if so identify the

specified officers or employees:

OSHA
Mine Safety and Health Administration
Pension and Welfare Benefits Administration
Employment Training Administration
Employment Standards Administration
Office of Labor-Management Standards

RESPONSE. We should note that, as a general matter, the Federal Bureau of Investigation (FBI) has criminal investigative authority over all violations of Federal law, including the criminal provisions found in Title 18 of the United States Code. Other departments, including the Department of Labor, have authority to conduct criminal investigations only "when investigative jurisdiction had been assigned by law to such departments of agencies." See 28 U.S.C. 533(1); 28 CFR §0.85(a).

Each agency within the Department of Labor that is responsible for administering the various regulatory programs assigned to the Department does possess broad authority to conduct investigations to ensure that the statutory requirements are being complied with. The following is a discussion of certain specific criminal provisions contained in statues administered by the Department.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION - The Occupational Safety and Health Act (OSH Act) authorizes the Secretary of Labor to enter, inspect and investigate places of employment in order to carry out the purposes of the OSH Act (29 U.S.C. 657). The Secretary is also authorized to issue citations for violations of the OSH Act (29 U.S.C. 658). The Act provides several criminal penalty provisions. Section 17 (e) provides that an employer whose willful violation of an OSHA standard causes death to an employee can receive a maximum fine of $10,000 for a first offense, and imprisonment for not more than six months (29 U.S.C. 666(e)). With a second conviction for a violation committed after the first conviction of such person, the maximum fine can be $20,000, with imprisonment up to 1 year. Section 17 (f) provides that any person who gives advance notice of any inspection without authority from the Secretary shall be punished by a fine of not more than $1,000 or by imprisonment for not more than six months. Section 17 (g) provides that a false statement in any document required pursuant to the OSH Act shall be punished by a fine of not more than $10,000 or by imprisonment for not more than 6 months, or both (29 U.S.C. 666(g)).

MINE SAFETY AND HEALTH ADMINISTRATION - Section 103 of the Federal Mine Safety and Health Act of 1977 (the "Mine Act"), 30 U.S.C. 813, provides broad authority for authorized representatives of the Secretary of Labor to make investigations

to determine whether there is compliance with the mandatory safety and health standards and other requirements under the Mine Act. This includes special investigations of possible criminal violations under the Mine Act as set forth in Sections 110(c), (d), (e), (f), and (h).

Pursuant to Section 302 of the Federal Mine Safety and Health Amendments Act of 1977, the Secretary of Labor, acting through the Assistant Secretary for Mine Safety and Health, enforces the Mine Act. Authorized representatives of the Secretary of Labor responsible for the enforcement of the Mine Act are appointed by the Secretary pursuant to Section 505 of the Mine Act.

PENSION AND WELFARE BENEFITS ADMINISTRATION - Section 506 (b) of ERISA gives the Secretary of Labor the responsibility and the authority to investigate and refer civil and criminal violations of the Act. Under Title 5 U.S.C., App. 3, §9(a)(1)(J), the responsibility for investigations concerning labor racketeering as it affects employee benefit plans has been delegated to the Office of Labor Racketeering in the Office of the Inspector General. Under the Secretary of Labor's Order 1-87, the authority to conduct all other criminal investigations involving employee benefit plans has been delegated to the PWBA. Within the PWBA, the criminal investigatory authority is exercised by the Office of Enforcement investigators.

EMPLOYMENT AND TRAINING ADMINISTRATION - There are several statutes which are the responsibility of the Employment Training Administration. The following is a brief discussion of the criminal provisions of these statutes.

The Job Training Partnership Act - (29 U.S.C. 1501 et seq.) establishes programs funded and administered by the Secretary of Labor to prepare youth and unskilled adults for entry into the labor force. Section 163 of the Act (29 U.S.C. 1573), among other things, authorizes the Secretary "to monitor all recipients of financial assistance" under the Act and to "investigate any matter the Secretary deems necessary to determine compliance with" the Act. Section 164(c)(2) of the Act (29 U.S.C. 1574(c)(2)) provides that: "Nothing in this Act shall be deemed to relieve the Inspector General of the Department of Labor of his responsibilities under the Inspector General Act". The only "criminal specific" provision in the Act is Section 182, which amended 18 U.S.C. 665, making it JTPA specific with regard to "Theft or Embezzlement from Employment and Training Funds: Improper Inducement: Obstruction of Investigations". The Act does not specify which DOL officers or employees, if any, should undertake criminal investigations as part of the JTPA regulatory or enforcement mission.

The Unemployment Compensation Employment Service And Related Federal Programs - Titles III, IX, and XII of the Social Security Act (42 U.S.C. 501 et seq., 1101 et seq., and 1321 et seq.), the Federal Unemployment Tax Act (chapter 23 of the Internal Revenue Code of 1986, 26 U.S.C. 3301 et seq.), and the Wagner-Peyser Act comprise the Federal statutory foundation for the Federal-State unemployment compensation and employment service systems. There are no criminal provisions in these statutes. Such criminal provisions as do apply to these Federal-State programs are contained in the State unemployment compensation and employment service laws.

Chapter 85 of title 5 of the United States Code (5 U.S.C. 8501 et seq.) contains the only permanent Federal unemployment compensation programs, which cover Federal civilian employees in all branches of the Federal Government and former members of the uniformed services including the Commissioned Corps of the National Oceanic and Atmospheric Administration. The criminal provisions for these programs are in 18 U.S.C. 1919, which contains no reference to which officials or employees of the Federal Government are authorized to conduct these investigations.

Chapter 2 of title II of the Trade Act of 1974 (19 U.S.C. 2271 et seq.) contains the Trade Adjustment Assistance Program for workers adversely affected with respect to their employment in United States industry by foreign imports of articles like or directly competitive with articles produced by such workers' firm or appropriate subdivision thereof. Criminal provisions are contained in section 244 of the Act (19 U.S.C. 2316), which contains no reference to which officials or employees of the Federal Government are authorized to conduct these investigations.

The Disaster Unemployment Assistance Program, administered by DOL under delegation of authority from the Federal Emergency Management Agency, is authorized under section 410 of The Robert T. Stafford Disaster Relief and Emergency Assistance Act. Criminal provisions are contained in section 314 of the Act (42 U.S.C. 5157, which contains no reference to which officials or employees of the Federal Government are authorized to conduct these investigations.

The only other existing unemployment compensation-type program is the Redwood Employees Protection Program, which is now in the process of phasing out. The program was created under title II of Public 95-250 (March 27, 1978), which contains no criminal provisions.

The Immigration and Nationality Act (8 U.S.C. 1101 et seq). - Pursuant to 8 U.S.C. 1101(a)(15)(H)(ii)(a) and (ii) 1182(a)(14), and 1184(c) and the INS regulations at 8 CFR 214.2(h), the

Employment and Training Administration certifies to the Attorney General regarding the employment of certain immigrant and non-immigrant aliens in the United States. The Attorney General at 8 U.S.C. 1103, is "charged with the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens" with exceptions not relevant to the Senator's question. Accordingly, the Immigration and Nationality Act does not specify that DOL officers or employees are to undertake criminal investigations under that Act. Criminal law enforcement in these programs, primarily relating to fraud, is undertaken by the Department of Justice, primarily under 18 U.S.C. 1001 and 1546.

EMPLOYMENT STANDARDS ADMINISTRATION - There are a number of statutes which are the responsibility of the Employment Standards Administration. The following is a brief discussion of the criminal provisions of the more significant statutes.

Wage and Hour Statutes. The principal statutes administered by the Wage and Hour Division which contain criminal penalties are: the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 216(a), making it a crime to willfully violate the provisions of the Act; the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), 29 U.S.C. 1851, making it a crime to willfully and knowingly violate the Act or regulations thereunder; the Consumer Credit Protection Act (CCPA), 15 U.S.C. 1674, making it a crime to willfully discharge an employee because his or her earnings have been subjected to garnishment for any one indebtedness; the Contract Work Hours and Safety Standards Act (CWHSSA), 40 U.S.C. 332, making it a crime to intentionally violate any provisions of the Act; and the Copeland Act, 18 U.S.C. 874, making it a crime to induce any person on a Federal or Federally assisted construction contract to give up any part of the compensation to which he is entitled, and 40 U.S.C. 276c, specifically applying 18 U.S.C. 1001 to wage statements furnished to the government on Federal and Federally assisted construction contracts. Investigations undertaken by Wage-Hour in connection with the enforcement of these various labor standards disclose these violations.

FLSA - Section 11(a) of the FLSA commits to the Secretary of Labor or his/her designated representatives authority to investigate wages, hours and other conditions of employment in industries subject to the Act. The Secretary is directed to utilize the bureaus and divisions of the Department for all investigations and inspections.

Section 4(a) of the FLSA creates the Wage and Hour Division, under the direction of the Administrator. Reorganization Plan No. 6 of 1950 (64 Stat. 1263) transfers to the Secretary all functions of other officers of the Department, including the

Wage-Hour Administrator, and all functions of all agencies of the Department, including the Wage and Hour Division.

The Secretary has, by administrative delegations, delegated enforcement authority under the FLSA to the Assistant Secretary for Employment Standards (current delegation reflected in Secretary's Order 1-89, Jan. 13, 1989); the latter official has in turn delegated authority for FLSA enforcement to the Administrator of the Wage and Hour Division (Employment Standards Order No. 89-02, March 17, 1989).

While the FLSA grants broad enforcement authority to the Secretary, neither the statute nor the delegation orders specifically designate officials responsible for criminal investigations under the Act.

MSPA - Section 512(a) of MSPA directs the Secretary to conduct investigations to determine compliance with the Act. By administrative delegation, this authority has been delegated to the Assistant Secretary for Employment Standards (Secretary's order 1-89, Jan. 13, 1989), and redelegated to the Administrator of the Wage and Hour Division (Employment Standards Order No. 89-02, Mar. 17, 1989).

While the MSPA grants broad investigative authority to the Secretary, neither the statute nor the delegation orders specifically designate officials responsible for criminal investigations under the Act.

CCPA - Section 306 of CCPA directs the Secretary, acting through the Wage and Hour Division, to enforce the provisions of the Act. Delegations of this authority have been made from the Secretary to the Assistant Secretary for Employment Standards, and then to the Administrator of the Wage and Hour Division. Neither the statute nor the delegation orders specifically designate officials responsible for criminal investigations under the Act.

Contract Work Hours and Safety Standards Act and the Copeland Act -Reorganization Plan No. 14 of 1950 (64 stat. 1267) assigns to the various contracting agencies and to the Secretary of Labor responsibility for investigations with respect to compliance with these statutes. In addition, the Secretary of Labor has authority to issue rules, standards, and procedures which are binding upon the contracting agencies. Delegations of the Secretary's authority, as described above for FLSA and MSPA, have been made by the Secretary. While the Secretary is given investigative authority, neither the statute nor the delegation orders specifically designate officials responsible for criminal investigations under the Acts.

Office Of Workers' Compensation Statutes - ESA's Office of Workers' Compensation Programs (OWCP) administers four statutes. These statutes are: (1) the Federal Employees' Compensation Act (FECA), 5 U.S.C. §8101 et seq.; (2) the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 et seq.; (3) the War Hazards Compensation Act, 42 U.S.C. §1701 et seq; and (4) the Black Lung Benefits Act, 30 U.S.C. 901-945 (1982).

The FECA itself does not contain any criminal provisions; rather applicable criminal provisions are set forth at 18 U.S.C. §§ 292, 1920, 1921 and 1926. None of these sections specify which agency or official should conduct investigations. The Secretary's investigative authority is set out in section 8126. It states the Secretary may, on any matter within her jurisdiction: (1) issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles; (2) administer oaths; (3) examine witnesses; and (4) require the production of books, papers, documents and other evidence.

The War Hazards Compensation Act has two criminal provisions at 42 U.S.C. §§ 1713 and 1714. These sections are silent as to which agency or office has investigative authority.

The LHWCA contains several criminal provisions: §§ 15(a), 23(e), 31(a)(10, 31(c), and 38(a) and (b). With the exception of § 31(a), the LHWCA provisions are silent as to which agency or officer has authority to conduct investigations. Subparagraph (2) of § 31(a) provides that the United States Attorney shall make every reasonable effort to investigate complaints filed under subparagraph (1). Section 39 of the Longshore Act authorizes the Secretary to administer the statute which includes the authority to receive and process claims for benefits. The statute, with certain specific exceptions, does not specifically grant the Secretary "investigative and enforcement" authority.

The Black Lung Benefits Act, 30 U.S.C. 901-945 (1982), does not specify the DOL officers or employees authorized to undertake criminal investigations under the Act. Although several provisions of the Black Lung Act (including incorporated provisions of the Social Security and Longshore Acts) provide for criminal penalties (30 U.S.C. 933 (d)(2), 941; 33 U.S.C. 915, 928(e); 42 U.S.C. 406, 408), neither those nor any other provisions of the Act identify specific DOL officers or employees authorized to undertake criminal investigations.

Office of Federal Contract Compliance Programs - The laws administered by the Office of Federal Contract Compliance Programs (OFCCP) within ESA do not directly contemplate criminal investigations. The only mention of criminal enforcement is in Section 209(a)(4) of Executive Order 11246, which provides that the Secretary may "[r]ecommend to the Department of Justice that criminal proceedings be brought for the furnishing of false

information to any contracting agency or to the Secretary of Labor as the case may be." We do not understand this provision to authorize or envision criminal investigations; rather it simply empowers the Secretary to refer to DOJ instances of suspected criminal falsification of records that might be discovered during regular nondiscrimination and affirmative action investigations.

OFFICE OF LABOR MANAGEMENT STANDARDS - The Office of Labor-Management Standards has enforcement responsibilities regarding four statutes: 1) the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. § 401 et seq.; 2) Section 1209(b) of the Postal Reorganization Act, 39 U.S.C. § 1209(b); 3) the standards of conduct provisions of the Civil Service Reform Act of 1978 at 5 U.S.C. § 7120; and 4) the standards of conduct provisions of the Foreign Service Act of 1980 at 22 U.S.C. § 4117. Among those enforcement provisions, only the LMRDA contains criminal sanctions.

The LMRDA contains twelve sections containing criminal provisions. None of those criminal provisions specifies which Department of Labor officers or employees should undertake those criminal investigations. With respect to both the criminal and civil provisions of the LMRDA, section 601 of the LMRDA, 29 U.S.C. § 521, states only that the "Secretary" has the power to conduct the investigations. Section 601 states in pertinent part:

> The Secretary shall have power when he believes it necessary in order to determine whether any person has violated or is about to violate any provision of this Act (except title I or amendments made by this Act to other statutes) to make an investigation and in connection therewith he may enter such places and inspect such records and accounts and question such person as he may deem necessary to enable him to determine the facts relative thereto.

In conjunction with LMRDA criminal investigations, U.S. Attorneys sometimes request the Office of Labor-Management Standard's involvement in the investigation of violations of other related criminal statutes such as the Hobbs Act, the Racketeer Influenced and Corrupt Organizations Act (RICO), mail fraud, and wire fraud.

QUESTION. (b) How many criminal investigators (1811s) are currently employed in each of the programs listed in (a) above? (c) How many criminal investigator (1811) positions are requested in the FY 91 budget and how many will be requested in the FY 92 budget for each agency or program listed above?

RESPONSE. None of the programs listed above currently employs investigators specifically designated as "criminal investigators" (1811s). The Department has not requested any of these positions in the FY 91 budget. The FY 92 budget has not yet been completed.

The Occupational Safety and Health Administration (OSHA) will have 1,290 compliance safety and health officers in the FY 91 budget. These compliance safety and health officers are trained to perform initial criminal investigations as part of their duties.

The Mine Safety and Health Administration (MSHA), in the FY 91 budget, will have 1139 inspectors in the 1822 job classification series which includes a staff of approximately 60 people assigned to conduct special investigations. MSHA's special investigators are generally selected from the inspector work force in the 1822 job classification, because their specific knowledge of mining conditions and practices is needed to conduct comprehensive investigations of possible knowing or willful violations of the Federal Mine Safety and Health Act of 1977 and subsequent regulations. Once selected, they retain their job classification as a mine inspector. In order to qualify for appointment as an inspector, an applicant normally has 5 years of mining experience, and all mine inspector personnel go through intensive classroom and on-the-job training.

The Pension and Welfare Benefits Administration (PWBA) employs 234 investigators (series 1801), supervisory investigators, and auditors in its field offices; another 37 employees are located in the Office of Enforcement at the PWBA National Office. All PWBA investigators and auditors are qualified and available to conduct both criminal and civil investigations. PWBA places an emphasis on hiring investigators with accounting and legal backgrounds as these skills are requisite for detecting both fiduciary breaches and the sort of white collar crimes typically found in criminal violations involving employee benefit plans. PWBA believes that their investigator approach (i.e., ability to conduct criminal and civil investigations), with emphasis on skills required by the specialized nature of the employee benefits field, is an appropriate and useful one. It also allows PWBA greater flexibility to adapt to changes in the mix of criminal and civil investigations in their workload, as necessary.

The Employment and Training Administration (ETA) employs no investigators.

The Employment Standards Administration (ESA) has responsibility for a number of different programs. While ESA does not employ criminal investigators, it does employ compliance officers in its Wage and Hour Division and Office of Federal Contract Compliance Programs. ESE currently has 1,057 Wage-Hour Compliance Specialist positions in the 249 job classification series to investigate possible violations of Wage-Hour programs and to carry out Wage and Hour Division enforcement responsibilities. It has 585 Equal Opportunity Specialist positions in the 160 job classification series to investigate possible violations of OFCCP programs and carry out enforcement activities of the Office of Federal Contract Compliance Programs. Compliance specialists are not employed in ESA's Office of Workers' Compensation Programs.

The Office of Labor-Management Standards (OLMS) employs 277 investigators. These investigators are trained to perform both civil and criminal investigations.

QUESTION. What kind of criminal investigative and other training do inspectors or other enforcement personnel receive, and exactly how does that compare (citing similarities and differences) to the training that SEC employees with similar duties get?

RESPONSE. The Department has no specific knowledge of the type or extent of training which the SEC provides to its personnel. The following discussion is a brief summary of the type of training provided to investigators in OSHA, MSHA, PWBA, ESA, and OLMS.

OSHA. All OSHA Compliance Safety and Health Officers attend basic compliance training courses. Two OSHA Training Institute courses include instruction on criminal investigation techniques. Those courses, "Inspection Techniques and Legal Aspects" and "Accident Investigation", include lecture materials on the preservation of evidence, the chain of evidence, diagraming, and photography, as they apply to criminal violations. In FY 89, the OSHA Training Institute provided training to 425 Federal and State personnel in these two courses.

MSHA. MSHA's special investigations personnel, as previously mentioned, normally have had 5 years of mining experience and have received formal mine inspector training. Additionally, employees who are selected as special investigators usually possess more than 3 years of experience as an inspector. Special investigators receive additional training in investigative techniques, interviewing, report writing, the provisions of the

Mine Act that are applicable to investigative work, and current policy and procedures for conducting special investigations.

PWBA. PWBA places a strong emphasis on the development and delivery of a comprehensive skill training program for agency personnel. The criminal provisions of ERISA and provisions of the United States criminal code which relate to ERISA-covered employee benefits plans are studied by new employees, including PWBA investigators, when they attend the PWBA Basic Training Program during their first year of employment. The Basic Training course generally covers the law relating to employee benefits plans, which includes: relevant statutory provisions; elements of proof required to substantiate an allegation of a violation; relevant court decisions; areas/types of conduct where the potential for criminal abuse is most likely to exist.

PWBA enforcement managers and investigators also participate in the White Collar Crime Training Program at the Federal Law Enforcement Training Center. In addition, PWBA is conducting a Criminal Training Program in June 1990 to further educate employees on criminal investigative techniques.

PWBA investigator training on crimes involving employee benefit plans is continued after the Basic Training Course through structured on-the-job training. PWBA area directors are instructed to encourage employees to attend outside courses and college or law school classes to enhance their skills. Investigators are also expected to attend a series of agency-sponsored courses designed to improve the performance of their duties. These courses include Financial Institutions, which familiarizes investigators with issues and investigative techniques involving financial institutions; and Employee Benefit Plan Accounting, which educates investigators with accounting practices related to ERISA plans. Finally, we have initiated training for computerized enforcement targeting based on implementation of the ERISA Information System database.

ESA. Within ESA, there is different training for the enforcement staff of the different programs. The Wage and Hour Division requires its new compliance specialists to take training which provides them with the necessary knowledge and skills to carry out its enforcement activities. New compliance specialists are required to attend a four-week basic training course which includes in-depth training in the labor standards for which the Wage and Hour Division is responsible. This basic training also includes instruction in interviewing techniques, review of records, and report writing skills. After about one year of on-the-job training, which involves working closely with a senior compliance specialist, all new compliance specialists receive an additional two weeks of advanced training which principally involves the government contract statutes.

The Office of Federal Contract Compliance Programs (OFCCP) also provides training to its enforcement specialists to enable them to carry out its enforcement responsibilities in a professional and consistent manner. Its training academy contains a curricula specifically geared to enabling OFCCP compliance specialists to carry out its enforcement responsibilities. For instance, the "New EOS Orientation Training" covers material from the rudiments of contract compliance oversight to the enforcement of OFCCP's legal mandates. Training is available to all employees from entry level through managerial positions. Technical training is also available with regard to investigating complex discrimination cases and in microcomputer and statistical applications.

OLMS. OLMS also provides a comprehensive training program for its investigative staff. Criminal enforcement training receives a significant amount of attention in the OLMS training program.

OLMS currently sends all new investigators to six weeks of formal classroom training during their first year of employment. Most of the course instruction they receive has applicability to criminal enforcement. The Union Records and Reporting course teaches investigators about records maintained by unions and builds their skill at analyzing them. This skill is particularly important for developing investigative leads. Moreover, most embezzlement cases include reporting and recordkeeping violations. In addition, virtually every OLMS criminal case is based on accounting and other financial records so there is an Auditing Techniques and CAP course. The Investigative Skills course is designed to teach all aspects of the critical tasks an investigator of both civil and criminal cases must master.

For several years, OLMS has utilized the Federal Law Enforcement Training Center (FLETC) in Glynco, Georgia as a source of Advanced Investigator Training. In FY 89, OLMS sent 12 experienced investigators to the two-week White Collar Crime Training Program. Another experienced OLMS investigator was sent to FLETC's Advanced Interviewing Training Program.

In addition to its formal training programs for investigators, OLMS undertakes other training activities for all personnel. OLMS requires its field offices to conduct a training day each quarter. In their self-designed quarterly training days, field offices frequently devote attention to criminal enforcement matters. In addition, OLMS frequently requires its field offices to conduct specific training. During FY 89, OLMS required such training be carried out with respect to 1) the new Sentencing Guidelines, 2) Grand Jury secrecy requirements and Rule 6(e) of the Federal Rules of Criminal Procedure, and 3) a newly issued OLMS Operations Manual.

Some of the most significant OLMS training in the area of criminal enforcement was conducted in FY 1988 and deserves mention because of its direct applicability and scope. In FY 1988, OLMS presented four regional training conferences for its investigators. These training sessions were conducted in cooperation with the U.S. Attorney Offices which provided instructors and other valuable assistance to the conferences. Topics covered included case presentations and investigator-attorney teamwork, and an actual criminal case mock trial was conducted.

QUESTION. During the period of the Department's study of its enforcement activities, has the Department referred any criminal cases to the DOJ for prosecution or investigation? If so, please identify under separate cover the referring agency or program, date of referral, nature of allegation, and its current status.

RESPONSE. Attached is a listing by program area of criminal referrals made by the Department during the period of January, 1989, until March, 1990. We would note that this listing is not exhaustive but it represents the best information readily available. We would also note that this listing does not include any referrals for criminal investigations that program agencies may have made to the Inspector General's office or any referrals that the Inspector General's Office may have made to the Department of Justice relating to DOL programs. They declined the opportunity to include their figures in this listing.

As you will see from the listing, six Wage Hour matters were referred during this time period. The total number of cases referred by the Mine Health And Safety Administration during this period was twenty-one. Seventeen of these cases involved willful violations under the Federal Mine Safety and Health Act of 1977. The remaining four cases involved threats of assault against Federal Mine Investigators under 18 U.S.C. 111.

The Occupational Safety and Health Administration referred six cases during this time. The Pension and Welfare Benefits Administration referred a total of twenty-three cases to the Department of Justice during this time. The Office of Labor-Management Standards referred a total of 188 cases during this period.

In addition to the responses to the above questions, the Department would like to provide the following statement from the Solicitor of Labor, Robert P. Davis, in order to clarify the issue of criminal investigations in the Wage-Hour area.

"I would also like to take this occasion to clarify and amplify my response to your questions concerning the testimony previously given before your Committee by the Acting Inspector General. He testified, I believe, to the effect that unidentified employees of the Wage and Hour Division and of the Solicitor's Office had said that they "didn't believe in criminal cases."

As I testified, I am certain that I did not authorize or make such a statement. I want to add, however, that I believe that no such statement was made by my staff or by Wage-Hour Division officials, and that it is therefore likely that some misunderstanding underlies Mr. Maria's account. I have, since I first learned about the case in question, made quite detailed inquiries about it. In that connection I have discussed the matter with all the members of my staff who were involved, including my Deputy Solicitor for National Operations, and with my predecessor. Although I have received considerable information about what took place, I have discovered no evidence tending to corroborate that any sentiment along the lines described in Mr. Maria's testimony was expressed.

Although I concluded some time ago, shortly after learning of Mr. Maria's testimony, that Mr. Maria was probably in error concerning this matter, I believed at the time that no useful purpose would be served by engaging in a public dispute with him concerning events which had occurred during the prior administration in connection with a case which was, as best I could determine, quite successfully pursued despite the tensions it generated. However, as a result of the reemergence of this testimony as a matter of concern to you in your recent hearing, I felt it important to bring these further aspects to your attention. In fact, a comprehensive description of the involvement of the Wage-Hour Division and of the Solicitor's Office in this matter from start to finish could be provided, should you wish to explore the matter in detail.

The personnel of the Solicitor's Office who were involved in the discussions with the Inspector General's Office personnel on that case are fully committed, as I am, to the effective use of <u>all</u> the available techniques of law enforcement, including criminal prosecution, in appropriate cases. They are engaged, under my direction, in supporting and representing our Wage-Hour Division in all its law enforcement efforts, and specifically, at present, in its reexamination of enforcement in the context of the Department's overall enforcement review effort. I am quite confident that this effort will demonstrate a renewed commitment to the effective and efficient use of the full panoply of remedial techniques, including those of the criminal process, in enforcing the labor standards laws."

CRIMINAL REFERRALS TO THE DEPARTMENT OF JUSTICE
OR U.S. ATTORNEYS

I. Employment Standards Administration

#1 Date of referral: July, 1989

Nature of allegation: Criminal violations of Fair Labor Standards Act (FLSA)

Status: Under review by U.S. Attorney's Office.

#2 Date of referral: March, 1989

Nature of allegation: FLSA case involving obstruction of proceeding (18 U.S.C. 1505)

Status: A conviction was obtained which has been appealed.

#3 Date of referral: April, 1989

Nature of allegation: FLSA case involving criminal violation for falsification of back wage receipts (18 U.S.C. 1001)

Status: U.S. Attorney declined prosecution.

#4 Date of referral: March, 1990

Nature of allegation: Criminal violations of Migrant and Seasonal Agricultural Worker Protection Act (MSPA) and FLSA and a possible charge of slavery

Status: Indictments have been issued.

#5 Date of referral: October, 1989

Nature of allegation: MSPA and H2A case involving criminal violation for interfering with inspections of a governmental official

Status: U.S. Attorney declined prosecution.

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#6 Date of referral: November, 1989

Nature of allegation: Service Contract Act (SCA) case involving criminal violation for mail fraud

Status: Under review by U.S. Attorney's Office.

II. Mine Safety and Health Administration

#1 Date of referral: January 4, 1989

Nature of allegation: Illegal mining operations

Status: Defendents convicted and sentenced on September 18, 1989.

#2 Date of referral: January 24, 1989

Nature of allegation: Crash of pickup truck with defective brakes

Status: Prosecution declined by United States Attorney on May 15, 1989.

#3 Date of referral: February 16, 1989

Nature of allegation: Fatal highwall collapse

Status: Prosecution declined by United States Attorney on January 17, 1990.

#4 Date of referral: March 17, 1989

Nature of allegation: Possible alteration of respirable dust sample cassettes

Status: Presently pending before Grand Jury.

#5 Date of referral: March 17, 1989 (companion case to no. 4)

Nature of allegation: Possible alteration of respirable dust sample cassettes

Status: Under consideration by United States Attorney for prosecution.

#6 Date of referral: May 19, 1989

Nature of allegation: Illegal mining operation

Status: Indictment returned and awaiting trial.

#7 Date of referral: May 19, 1989 (companion case to no. 6)

Nature of allegation: Illegal mining operation

Status: Indictment returned and awaiting trial.

#8 Date of referral: August 1, 1989

Nature of allegation: Illegal mining operation

Status: Presently pending before Grand Jury.

#9 Date of referral: October 3, 1989

Nature of allegation: Possible willful violations contributing to methane explosion

Status: Presently pending before Grand Jury.

#10 Date of referral: October 3, 1989 (companion case to no. 9)

Nature of allegation: Violations of mandatory safety standards

Status: Presently pending before Grand Jury.

#11 Date of referral: October 3, 1989 (companion case to no. 9)

Nature of allegation: Violations of mandatory safety standards

Status: Presently pending before Grand Jury.

#12 Date of referral: October 3, 1989 (companion case to no. 9)

4

Nature of allegation: Violations of mandatory safety standards

Status: Presently pending before Grand Jury.

#13 Date of referral: December 1, 1989

Nature of allegation: Operating mine in violation of withdrawal orders

Status: Presently under consideration by United States Attorney for prosecution.

#14 Date of referral: January 25, 1990

Nature of allegation: Falsification of respirable dust sampling data cards

Status: Presently under consideration by United States Attorney for prosecution.

#15 Date of referral: January 25, 1990

Nature of allegation: Eleven willful violations of mandatory safety standards

Status: Presently under consideration by United States Attorney for prosecution.

#16 Date of referral: January 25, 1990

Nature of allegation: Illegal mining operation

Status: Pending before Grand Jury.

#17 Date of referral: March 23, 1990

Nature of allegation: Falsification of accident reports and false reporting of radiation levels

Status: Presently under consideration by United States Attorney for prosecution.

#18 Date of referral: January 4, 1989

Nature of allegation: Assault on Federal Mine Inspector (18 U.S.C. 111)

Status: Defendant convicted and sentenced on April 13, 1989.

#19 Date of referral: June 2, 1989

Nature of allegation: Threats against Federal Mine Inspector (18 U.S.C. 111)

Status: Declined by United States Attorney on July 31, 1989.

#20 Date of referral: October 11, 1989

Nature of allegation: Threats against Federal Mine Inspector (18 U.S.C. 111)

Status: Declined by United States Attorney on October 20, 1989.

#21 Date of referral: April 4, 1990

Nature of allegation: Threats against Federal Mine Inspector (18 U.S.C. 111)

Status: Presently under consideration by United States Attorney for prosecution.

III. Occupational Safety and Health Administration

#1 Date of referral: July, 1989

Nature of allegation: Tunnel explosion; (1926.407) (section 17(e) of the Occupational and Safety Health Act (OSH Act))

Status: No prosecutorial action or other decision made yet.

#2 Date of referral: August, 1989

Nature of allegation: Trenching; (1926.652(b)) (section 17(e) of OSH Act)

Status: No prosecutorial action or other decision made yet.

#3 Date of referral: February, 1990

Nature of allegation: Steel erection; (1926.750(b)(2)(i)) (section 17(e) of OSH Act)

Status: No prosecutorial action or other decision made yet.

#4 Date of referral: February, 1990

Nature of allegation: False statements (18 USC 1001)

Status: No prosecutorial action or other decision made yet.

#5 Date of referral: March 1990

Nature of allegation: Trenching; (1926.652(b) or (c)) (section 17(e) of OSH Act)

Status: No prosecutorial action or other decision made yet.

#6 Date of referral: March, 1990

Nature of allegation: Trenching; (1926.652(b) or (c)) (section 17(e) of OSH Act)

Status: No prosecutorial action or other decision made yet.

IV. Pension and Welfare Benefits Administration

#1 Date of referral: January, 1989

Nature of allegation: 18 USC 664 (theft or embezzlement from employee benefit plan)

Status: Case pending, awaiting decision by U.S. Attorney.

#2 Date of referral: February, 1989

Nature of allegation: 18 USC 664 (theft or embezzlement from employee benefit plan)

Status: U.S. Attorney declined criminal prosecution.

#3 Date of referral: February, 1989

Nature of allegation: 18 USC 664 (theft or embezzlement from employee benefit plan)

Status: U.S. Attorney declined criminal prosecution.

#4 Date of referral: March, 1989

Nature of allegation: 18 USC 664 (theft or embezzlement from employee benefit plan)

Status: U.S. Attorney declined criminal prosecution.

#5 Date of referral: March, 1989

Case Name: U.S. v. Lundberg

Nature of allegation: 18 USC 664 (theft or embezzlement from employee benefit plan); 18 USC 1027 (false statments in documents required by ERISA); 18 USC 371 (conspiracy to commit offense or defraud the USA)

Status: On March 17, 1989, the U.S. Attorney indicted five individuals; three defendants have been sentenced and two are awaiting sentencing.

#6 Date of referral: March, 1989

Case Name: U.S. v. Gruendel

Nature of allegation: 18 USC 664 (theft or embezzlement from employee benefit plan)

Status: Defendents, pled guilty and are awaiting sentencing.

#7 Date of referral: April, 1989

Case Name: U.S. v. Gautreaux

Nature of allegation: 18 USC 664 (theft or embezzlement from employee benefit plan)

Status: Defendant pled guilty and was sentenced.

#8 Date of referral: May, 1989

Nature of allegation: 18 USC 664 (theft or embezzlement from employee benefit plan)

Status: U.S. Attorney declined criminal prosecution.

#9 Date of referral: June, 1989

Nature of allegation: 18 USC 664 (theft or embezzlement from employee benefit plan)

Status: U.S. Attorney declined criminal prosecution.

#10 Date of referral: August, 1989

Nature of allegation: 18 USC 664 (theft or embezzlement from employee benefit plan); 18 USC 1027 (false statements in document required by ERISA); 29 USC 1131 (willful violation of ERISA reporting and disclosure provisions)

Status: Case pending, awaiting decision by U.S. Attorney.

#11 Date of referral: August, 1989

Case Name: U.S. v. Gaudet

Nature of allegation: 18 USC 664 (theft or embezzlement from employee benefit plan)

Status: Indictment obtained.

#12 Date of referral: September, 1989

Nature of allegation: 18 USC 664 (theft or embezzlement from employee benefit plan)

Status: Case pending, awaiting decision by U.S. Attorney.

#13 Date of referral: September, 1989

Nature of allegation: 18 USC 664 (theft or embezzlement from employee benefit plan)

Status: Case pending, awaiting decision by U.S. Attorney.

#14 Date of referral: October, 1989

Nature of allegation: 18 USC 371 (conspiracy to commit offense or defraud USA); 18 USC 664 (theft or embezzlement from employee benefit plan); 18 USC 1001 (false statements); 29 USC 501(c) (embezzlement of assets of a labor organization)

Status: U.S. Attorney declined prosecutive action.

#15 Date of referral: October, 1989

Nature of allegation: 18 USC 664 (theft or embezzlement from employee benefit plan)

Status: Case pending, awaiting decision by U.S. Attorney.

#16 Date of referral: October, 1989

Nature of allegation: 18 USC 664 (theft or embezzlement from employee benefit plan)

Status: U.S. Attorney declined prosecutive action.

#17 Date of referral: December, 1989

Nature of allegation: 18 USC 664 (theft or embezzlement from employee benefit plan)

Status: U.S. Attorney declined prosecutive action.

#18 Date of referral: January, 1990

Nature of allegation: 18 USC 664 (theft or embezzlement from employee benefit plan)

Status: Case pending, awaiting decision by U.S. Attorney.

#19 Date of referral: January, 1990

Nature of allegation: 18 USC 664 (theft or embezzlement from employee benefit plan); 18 USC 1027 (false statements in documents required by ERISA)

Status: Case pending, awaiting decision by U.S. Attorney.

#20 Date of referral: January, 1990

Nature of allegation: 18 USC 371 (conspiracy to commit offense or defraud USA); 18 USC 664 (theft or embezzlement from employee benefit plan); 18 USC 1027 (false statements in documents required by ERISA); 18 USC 1341 (fraud and swindles)

Status: U.S. Attorney declined prosecutive action.

#21 Date of referral: February, 1990

Case Name: U.S. v. Frank T. Bayuk

Nature of allegation: 18 USC 664 (theft or embezzlement from employee benefit plan)

Status: Guilty plea, awaiting sentencing.

#22 Date of referral: February, 1990

Nature of allegation: 18 USC 664 (theft or embezzlement from employee benefit plan)

Status: Case pending, awaiting decision by U.S. Attorney.

#23 Date of referral: February, 1990

Nature of allegation: 18 USC 664 (theft or embezzlement from employee benefit plan) 18 USC 1027 (false statements in documents required by ERISA)

Status: Case pending, awaiting decision by U.S. Attorney.

V. Office of Labor-Management Standards

DATE	STATUS	ALLEGATION(S)
01/05/89	Conviction Obtained	29 USC 501(c)
01/06/89	Pending at DOJ	29 USC 439(b) 29 USC 439(c) 29 USC 501(c)
01/11/90	Conviction Obtained	29 USC 501(c)
01/12/89	Conviction Obtained	29 USC 501(c)
01/18/89	Indictment Obtained	29 USC 439(c) 29 USC 501(c)
01/18/89	Declined by DOJ and Local Prosecutor	29 USC 432(a) 29 USC 436
01/19/89	Conviction Obtained	29 USC 439 29 USC 501(c) 18 USC 1001
01/23/89	Conviction Obtained	18 USC 1001
01/31/89	Pending at DOJ	29 USC 501(c)
01/31/89	Declined by DOJ	29 USC 439(a) 29 USC 439(b) 29 USC 439(c) 29 USC 501(c)
02/01/89	Conviction Obtained	29 USC 501(c)
02/01/89	Declined by DOJ and is pending with Local Prosecutor	29 USC 501(c)
02/02/89	Conviction Obtained	18 USC 1001
02/03/89	Declined by DOJ	29 USC 439(c) 29 USC 501(c)
02/10/89	Declined by DOJ	29 USC 439(c) 29 USC 501(c) 18 USC 1344
02/15/89	Pending at DOJ	29 USC 439(c) 29 USC 501(c)

02/17/89	Conviction Obtained	29 USC 501(c)
02/22/89	Pending at DOJ	29 USC 439 29 USC 501(c) 29 USC 503
02/24/89	Complaint Issued by Local Prosecutor	State Theft Statute
02/28/89	Indictment Obtained	18 USC 1344
03/03/89	Conviction Obtained	29 USC 439(a) 29 USC 501(c)
03/15/89	Conviction Obtained	29 USC 439(c) 29 USC 501(c)
03/15/89	Conviction Obtained	29 USC 439(b) 29 USC 439(c) 29 USC 501(c)
03/17/89	Pending at DOJ	29 USC 439(c) 29 USC 501(c)
03/22/89	Pending at DOJ	29 USC 439(c) 29 USC 501(c)
03/28/89	Conviction Obtained	29 USC 439(c) 29 USC 501(c) 18 USC 1344
03/28/89	Conviction Obtained	29 USC 439(b) 29 USC 439(c) 29 USC 501(c)
03/28/89	Local Prosecutor Declined Prosecution	State Theft Statute
03/30/89	Pending at DOJ	29 USC 439(c) 29 USC 501(c) 29 USC 503(c)
03/30/89	Conviction Obtained	29 USC 439(c) 29 USC 501(c) 18 USC 1344
03/30/89	Indictment Obtained	29 USC 439(b) 29 USC 501(c)
03/30/89	Conviction Obtained	29 USC 439(c) 29 USC 501(c)

03/31/89	Conviction Obtained	29 USC 431(b)
03/31/89	Pending at DOJ	29 USC 439(c) 29 USC 501(c)
03/31/89	Conviction Obtained	29 USC 501(c)
04/06/89	Conviction Obtained	18 USC 1001
04/06/89	Conviction Obtained	18 USC 664 29 USC 501(c)
04/06/89	Conviction Obtained	29 USC 439(a) 29 USC 439(c) 29 USC 501(c)
04/06/89	Declined by DOJ and Local Prosecutor	29 USC 501(c)
04/07/89	Pending at DOJ	29 USC 436 29 USC 439(c) 29 USC 501(c)
04/07/89	Pending at DOJ	29 USC 431(b) 29 USC 436 29 USC 439 29 USC 501(c)
04/07/89	Pending at DOJ	29 USC 431(b) 29 USC 436 29 USC 439 29 USC 501(c)
04/12/89	Indictment Obtained	29 USC 439(b) 29 USC 439(c) 29 USC 501(c)
04/19/89	Conviction Obtained	29 USC 439(c) 29 USC 501(c)
04/20/89	Conviction Obtained	29 USC 439(c) 29 USC 501(c)
04/20/89	Pending at DOJ	29 USC 439(b) 29 USC 501(c)
04/21/89	Conviction Obtained	29 USC 439(c) 29 USC 501(c)
04/25/89	Conviction Obtained	29 USC 439(c) 29 USC 501(c)

04/25/89	Conviction Obtained by Local Prosecutor	State Theft Statute
04/27/89	Conviction Obtained	18 USC 2 18 USC 371 18 USC 373 18 USC 844(i)
04/28/89	Conviction Obtained	29 USC 439(b) 29 USC 439(c) 29 USC 501(c)
05/02/89	Conviction Obtained	29 USC 501(c)
05/03/89	Pending at DOJ	29 USC 439(c) 29 USC 501(c) 29 USC 503(a)
05/03/89	Conviction Obtained	29 USC 439(c) 29 USC 501(c)
05/04/89	Conviction Obtained	29 USC 439(c) 29 USC 501(c) 18 USC 664
05/08/89	Conviction Obtained by Local Prosecutor	State Theft Statute
05/11/89	Conviction Obtained	29 USC 439(b) 29 USC 501(c)
05/12/89	Pending at DOJ	29 USC 436 29 USC 439(b) 29 USC 439(c) 29 USC 501(c) 29 USC 504
05/15/89	Local Prosecutor Declined Prosecution	State Theft Statute
05/15/89	Conviction Obtained by Local Prosecutor	State Theft Statute
05/17/89	Conviction Obtained	29 USC 501(c)
05/17/89	Local Prosecutor Declined Prosecution	State Theft Statute
05/19/89	Conviction Obtained	29 USC 439(b) 29 USC 439(c) 29 USC 501(c)

05/24/89	Conviction Obtained by Local Prosecutor	State Theft Statute
05/30/89	Pending at DOJ	29 USC 439(b) 29 USC 439(c) 29 USC 501(c)
05/31/89	Conviction Obtained by Local Prosecutor	State Theft Statute
06/07/89	Complaint Filed	29 USC 409(b) 29 USC 409(c) 29 USC 501(c)
06/09/89	Indictment Obtained	29 USC 439(c) 29 USC 501(c)
06/13/89	Pending at DOJ	29 USC 439(c) 29 USC 501(c)
06/13/89	Pending at DOJ	29 USC 439(b) 29 USC 439(d) 29 USC 501(c)
06/15/89	Pending at DOJ	18 USC 2(a) 29 USC 439(c) 29 USC 501(c)
06/16/89	Conviction Obtained	29 USC 439(b) 29 USC 439(c) 29 USC 501(c)
06/16/89	Conviction Obtained	29 USC 501(c) 18 USC 2
06/19/89	Declined by DOJ	18 USC 1001 18 USC 1341
06/20/89	Pending at DOJ	29 USC 501(c)
06/20/89	Pending with Local Prosecutor	State Theft Statute
06/23/89	Declined by DOJ and Pending with Local Prosecutor	State Theft Statute
06/23/89	Pending at DOJ	29 USC 439(a) 29 USC 439(b) 29 USC 439(c) 29 USC 501(c)

06/23/89	Pending with Local Prosecutor	29 USC 439(c) 29 USC 501(c)
06/28/89	Conviction Obtained	29 USC 431(b) 29 USC 436 29 USC 501(c)
06/30/89	Conviction Obtained	29 USC 439(a) 29 USC 439(c) 29 USC 501(c)
07/05/89	Declined by Local Prosecutor	State Theft Statute
07/10/89	Declined by DOJ	18 USC 371 29 USC 439(a) 29 USC 439(c) 29 USC 501(c)
07/14/89	Pending at DOJ	29 USC 439(c) 29 USC 501(c)
07/18/89	Conviction Obtained	18 USC 2(a) 29 USC 439(b) 29 USC 439(c) 29 USC 501(c)
07/18/89	Declined by DOJ	29 USC 501(c)
07/21/89	Conviction Obtained	29 USC 439(a) 29 USC 439(b) 29 USC 501(c)
07/25/89	Conviction Obtained	18 USC 511(a) 29 USC 501(c)
07/26/89	Indictment Obtained	18 USC 371 18 USC 1341 29 USC 439(c) 29 USC (501(c) 42 USC 508(g)(2)
07/26/89	Conviction Obtained	29 USC 439(a) 29 USC 439(b) 29 USC 439(c) 29 USC 501(c)
08/01/89	Indictment Obtained	29 USC 439(b) 29 USC 439(c) 29 USC 501(c)

08/07/89	Conviction Obtained	29 USC 439(a) 18 USC 1001
08/07/89	Indictment Obtained and Subsequently Dismissed	29 USC 501(c)
08/09/89	Indictment Obtained	29 USC 439(c) 29 USC 439(d) 29 USC 501(c)
08/09/89	Pending with Local Prosecutor	State Theft Statute
08/09/89	Conviction Obtained	Local Theft Statute
08/11/89	Indictment Obtained	29 USC 439(b) 29 USC 501(c) 18 USC 1027
08/14/89	Pending at DOJ	29 USC 439(a) 29 USC 501(c) 18 USC 371 18 USC 1341 18 USC 1001
08/23/89	Pending at DOJ	29 USC 439(c) 29 USC 439(d) 29 USC 501(c)
08/23/89	Pending at DOJ	29 USC 439(c) 29 USC 501(c)
08/23/89	Indictment Obtained	29 USC 436 29 USC 439(b) 29 USC 501(c)
08/25/89	Indictment Obtained	29 USC 501(c) 18 USC 664
08/28/89	Pending at DOJ	29 USC 501(c)
08/30/89	Pending at DOJ	29 USC 439(b) 29 USC 439(c) 29 USC 501(c) 29 USC 1341
08/31/89	Indictment Obtained	29 USC 439(b) 29 USC 439(c) 29 USC 501(c)
09/06/89	Indictment Obtained	29 USC 439(c) 29 USC 501(c)

09/06/89	Pending at DOJ	29 USC 439(c) 29 USC 501(c)
09/07/89	Pending at DOJ	29 USC 439(c) 29 USC 501(c)
09/13/89	Pending at DOJ	29 USC 439(c) 29 USC 501(c)
09/14/89	Conviction Obtained	29 USC 439(c) 29 USC 501(c)
09/15/89	Pending at DOJ	29 USC 439(c) 29 USC 501(c)
09/20/89	Conviction Obtained	29 USC 436 29 USC 439(c) 29 USC 501(c)
09/20/89	Pending at DOJ	29 USC 439(c) 29 USC 501(c)
09/20/89	Conviction Obtained	29 USC 439(b) 29 USC 439(c) 29 USC 501(c)
09/21/89	Pending at DOJ	29 USC 501(c)
09/21/89	Indictment Obtained	29 USC 439(c) 29 USC 501(c)
09/22/89	Pending at DOJ	29 USC 501(c)
09/22/89	Pending at DOJ	29 USC 439(a) 29 USC 501(c) 29 USC 502(b)
09/22/89	Pending at DOJ	29 USC 436 29 USC 439 29 USC 501(c)
09/22/89	Conviction Obtained	29 USC 501(c)
09/27/89	Pending at DOJ	29 USC 439(c) 29 USC 501(c)
09/27/89	Indictment Obtained	29 USC 439(c) 29 USC 501(c)
09/29/89	Pending at DOJ	29 USC 501(c)
09/29/89	Pending at DOJ	29 USC 501(c)

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09/29/89	Pending at DOJ	29 USC 439(a) 29 USC 439(b) 29 USC 439(c) 29 USC 501(c)
09/29/89	Pending at DOJ	29 USC 501(c)
09/29/89	Pending at DOJ	29 USC 439(c) 29 USC 501(c)
09/29/89	Pending at DOJ	29 USC 439(c) 29 USC 501(c)
09/29/89	Pending at DOJ	29 USC 439(c) 29 USC 501(c)
09/29/89	Pending at DOJ	29 USC 501(c)
09/29/89	Pending at DOJ	29 USC 439(c) 29 USC 501(c)
10/04/89	Pending at DOJ	29 USC 439(b) 29 USC.501(c)
10/04/90	Declined by DOJ	29 USC 439(c) 29 USC 501(c)
10/05/89	Pending at DOJ	29 USC 209 29 USC 501(c)
10/09/89	Pending at DOJ	29 USC 439(c) 29 USC 501(c)
10/10/89	Conviction Obtained by Local Prosecutor	State Theft Statute
10/25/89	Pending at DOJ	29 USC 431 29 USC 436 29 USC 439(b) 29 USC 439(c) 29 USC 501(c)
10/25/89	Pending at DOJ	29 USC 439(b) 29 USC 439(c) 29 USC 501(c)
10/26/89	Pending at DOJ	29 USC 501(c)
11/09/89	Indictment Obtained	29 USC 501(c) 18 USC 664
11/14/89	Indictment Obtained	29 USC 501(c) 18 USC 2 18 USC 1962

11/14/89	Indictments Obtained	29 USC 432 29 USC 439 18 USC 1131 18 USC 186 18 USC 371 18 USC 1341
11/14/89	Indictment Obtained	29 USC 439(c) 29 USC 501(c)
11/15/89	Indictment Obtained	29 USC 436 29 USC 439(c) 29 USC 501(c)
11/17/89	Declined by Local Prosecutor	State Theft Statute
11/17/89	Pending at DOJ	29 USC 439(c) 29 USC 501(c)
11/22/89	Pending at DOJ	29 USC 439(c) 29 USC 501(c)
11/22/89	Pending at DOJ	29 USC 501(c)
11/28/89	Pending at DOJ	18 USC 1001 State Theft Statute
11/28/89	Indictment Obtained	18 USC 7 18 USC 13
11/30/89	Indictments and some Convictions Obtained	29 USC 439(c) 29 USC 501(c) 18 USC 371
11/30/89	Pending at DOJ	29 USC 439(b) 29 USC 439(c) 29 USC 501(c)
12/01/89	Pending at DOJ	29 USC 439(b) 29 USC 501(c)
12/04/89	Pending with Local Prosecutor	State Theft Statute
12/04/89	Conviction Obtained	29 USC 439(c) 29 USC 501(c)
12/06/89	Pending at DOJ	29 USC 439(b) 29 USC 501(c)

12/11/89	Pending at DOJ	29 USC 439(b) 29 USC 439(c) 29 USC 501(c)
12/14/89	Pending at DOJ	29 USC 501(c)
12/15/89	Pending at DOJ	29 USC 439(c) 29 USC 501(c)
12/18/89	Pending at DOJ	29 USC 501(c)
12/18/89	Pending at DOJ	29 USC 439(c) 29 USC 501(c) 18 USC 2(a) 18 USC 371
12/20/89	Pending at DOJ	29 USC 501(c)
12/21/89	Pending at DOJ	29 USC 439(c) 29 USC 501(c)
12/22/89	Pending with Local Prosecutor	State Theft Statute
12/27/89	Pending at DOJ	29 USC 439(c) 29 USC 501(c)
12/28/89	Pending at DOJ	29 USC 501(c)
12/29/89	Pending at DOJ	29 USC 501(c)
12/29/89	Pending at DOJ	29 USC 439(b) 29 USC 501(c)
12/29/89	Pending at DOJ	29 USC 439(c) 29 USC 501(c)
01/03/90	Pending at DOJ	29 USC 501(c)
01/04/90	Pending at DOJ	29 USC 439(c) 29 USC 501(c) 18 USC 1027
01/08/90	Pending at DOJ	29 USC 439 29 USC 501(c)
01/16/90	Pending at DOJ	29 USC 439(c) 29 USC 501(c)
01/19/90	Conviction Obtained by Local Prosecutor	29 USC 439(c) 29 USC 501(c)

01/25/90	Pending at DOJ	29 USC 439(a) 29 USC 439(c) 29 USC 501(c)
01/26/90	Pending at DOJ	29 USC 439(c) 29 USC 501(c)
01/29/90	Pending at DOJ	29 USC 439(c) 29 USC 501(c)
01/29/90	Pending at DOJ	29 USC 439(b) 29 USC 439(c) 29 USC 501(c)
01/31/90	Pending with Local Prosecutor	State Theft Statute
01/31/90	Pending at DOJ	29 USC 439(c) 29 USC 501(c)
02/06/90	Pending with Local Prosecutor	State Theft Statute
02/07/90	Pending with Local Prosecutor	State Theft Statute
02/09/90	Pending at DOJ	29 USC 439(c) 29 USC 501(c)
02/12/90	Conviction Obtained	29 USC 439(a) 29 USC 439(c) 29 USC 501(c)
02/16/90	Pending at DOJ	29 USC 439(c) 29 USC 501(c)
02/22/90	Pending with Local Local Prosecutor	State Theft Statute
02/23/90	Pending with Local Local Prosecutor	State Theft Statute
02/27/90	Pending at DOJ	29 USC 439(b) 29 USC 439(c) 29 USC 501(c)

DEPARTMENT OF HEALTH & HUMAN SERVICES

Washington, D.C. 20201

STATEMENT BY

KEVIN E. MOLEY

ASSISTANT SECRETARY FOR

MANAGEMENT AND BUDGET

DEPARTMENT OF HEALTH AND HUMAN SERVICES

BEFORE THE

COMMITTEE ON GOVERNMENTAL AFFAIRS

U.S. SENATE

MARCH 8, 1990

Good Morning, Mr. Chairman and members of the Committee. I am Kevin E. Moley, HHS' Assistant Secretary for Management and Budget. I am also the Department's Chief Financial Officer and Internal Controls Manager. I am pleased to have this opportunity to address the Committee on the status of the Department's efforts in implementing the Federal Managers' Financial Integrity Act (FMFIA).

The purpose of this Legislation is to ensure that the Federal Government has in place proper controls and fixed responsibilities, is identifying weaknesses and finally, has designed and implemented corrective action plans where needed.

I would first like to provide some background on our implementation of the Act. The Act is viewed in HHS as an important element in assuring that resources entrusted to our Department are used for their intended purpose free of fraud, waste and abuse. Shortly after the enactment of the FMFIA in 1982, the Secretary issued a directive establishing an organizational structure and delegating responsibilities for designing, implementing and operating a Department-wide FMFIA program.

The Secretary appointed the Assistant Secretary for Management and Budget (ASMB) as the Department's Internal Controls Manager.

The ASMB was delegated the authority to issue cross-cutting directives and to oversee their implementation on a Department-wide basis. The ASMB appointed a steering committee to provide advice and technical assistance to the program management officials. The FMFIA Steering Committee is comprised of technical representatives from each Operating Division (OPDIV), the Office of the Inspector General, the Office of the Assistant Secretary for Personnel Administration, key functional managers from ASMB and a representative of the Staff Divisions (STAFFDIVs).

My office develops all related policies necessary to effectively implement the provisions of the FMFIA. We are also responsible for overseeing the implementation of the Department-wide directives in accordance with OMB guidelines, and for preparing the Secretary's annual FMFIA report to the President and Congress.

The Secretary further directed that the responsibility for implementing the Federal Managers' Financial Integrity Act program rests with each Operating and Staff Division Head. Each of these senior officials is responsible for assuring that all resources entrusted to him/her are properly safeguarded and that systems are in place to evaluate the effectiveness of the safeguards. Each OPDIV/STAFFDIV Head, in turn, appointed an

Internal Control Officer (ICO) to assist him/her in assuring that Departmental/OMB directives are promptly and effectively implemented. Among other responsibilities, each ICO is responsible for issuing organization-wide policy for the program; for overseeing segmentation and risk/vulnerability assessments; conducting internal control reviews; identifying, tracking, and correcting of all weaknesses; applying quality assurance measures; and reporting on results.

Since inception of the program in HHS, the Office of Inspector General has been an integral part of the FMFIA process. They have participated fully on our steering committee, worked closely with us on policy issues and have been heavily involved in the operational aspects of the program. I was particularly pleased to note the following statement in their recent report to me on the FY 1989 FMFIA report.

> "Overall much has been accomplished to ensure internal and systems controls can be relied on to safeguard the Department's resources. Also, processes instituted to identify and correct material and other weaknesses continued to be upgraded."

The Department's FMFIA program is designed on the premise that:

- it be implemented and operated by managers within the existing organizational structure and delegations of authority,

- managers be held accountable for implementing and operating an effective program,

- the program be operated on a decentralized basis,

- all organizations, without exception, be covered by the program and,

- all programmatic and administrative activities be inventoried and reviewed on a periodic basis.

The implementation of the Department's FMFIA program has been an evolutionary process. Each year's experiences are reviewed and goals and expectations established for the future. This process, in my opinion, has kept the Department at the cutting edge of implementing new policies and techniques.

1989 Results

The Department was segmented into about eight thousand assessable

units of which more than eleven hundred were reviewed in FY 1989. In addition, we reviewed twelve of our thirteen financial systems for compliance with the provisions of the Comptroller General's principles and standards. These reviews and Inspector General activity resulted in management declaring twenty-four new material weaknesses and one new material non-conformance. In addition, management identified more than 3000 non-material weaknesses. All have been inventoried and are being tracked until fully corrected.

During FY 1989, a Council on Management Oversight was established and assigned the responsibility of independently reviewing HHS' implementation of the FMFIA, making recommendations for enhancements and reporting its findings to me and the Under Secretary. The Council is comprised of three senior officials from the Office of the Assistant Secretary for Management and Budget and one from the Office of the Inspector General.

Also during FY 1989, the Department established a much closer link between correction of weaknesses and the budget process. This has become increasingly important as the focus to correct major problems often involves significant resource requirements. We are also continuing to strengthen top management involvement in the program through briefings of our Under Secretary and reports of the Management Oversight Council.

For FY 1990 we plan to increase our effort both in policy and operational areas.

- Conduct over 1800 reviews of assessable units

- Correct 24 of the 36 outstanding material weaknesses and non-conformances.

- Link more closely the segmentation process to the organization's mission statements to assure that all program and administrative functions are covered.

- Imbed the perspective of the FMFIA program into all future reorganizations and implementation of new legislation/regulation to assure that internal controls are in place as such events occur.

- Establish a more comprehensive Department-wide training program to assure that managers and staff are fully aware of their FMFIA responsibility and how to conduct reviews.

Mr. Chairman, from my perspective, the development and implementation of the FMFIA has been an evolutionary process with enhancement being made as events require and experiences

indicate. The Secretary and Under Secretary have strengthened the program and fully support the increased efforts of all of their managers in identifying real or potential weaknesses and taking remedial action to promptly correct them.

Now I wish to turn to a discussion of the four high risk areas mentioned in your letter of invitation and in discussion with committee staff. These are:

- Medicare Secondary Payer
- Wage Reconciliation
- Indian Health Service
- Generic Drugs

The Medicare Secondary payer area was designated as a high risk area by the Secretary and OMB. It also was highlighted as a major concern by Comptroller General Bowsher.

To define terms, Medicare is secondary payer to an employer group health plan for beneficiaries over age 65, disabled beneficiaries, and during the first 12 months of a beneficiary's entitlement to Medicare on the basis of End Stage Renal Disease.

Medicare is also secondary payer to workers' compensation benefits and to automobile, liability, and no-fault insurance. This means that Medicare will pay for care only to the extent it is not paid for by these other sources.

In FY 1989, approximately $2.2 billion savings was achieved through Medicare secondary payer (MSP) efforts. This amount consists both of payments that have been avoided and mistaken Medicare payments that are recovered.

Identification of situations where Medicare should not be the primary payer occurs through a variety of mechanisms. We have devoted tremendous resources and efforts in the last several years to strengthen the enforcement of these provisions and significant savings for the Medicare program have been achieved. Some of these activities are described below:

o Education

Health Care Financing Administration (HCFA) has launched an aggressive outreach campaign aimed at educating beneficiaries, providers, physicians, employers, insurers, third party administrators, and underwriters about these provisions. These activities are performed by central and regional office staff and by Medicare contractors. They have included the following:

-- the distribution to Medicare contractors of training videos and guides for training providers and physician office personnel in identifying MSP situations.

-- the development of a video with a Trainers Guide for Social Security District Offices.

-- distribution of public service announcements to radio and television stations.

-- mailing of MSP information packages to approximately 550,000 physicians and their staff nationwide.

-- mailing of MSP information to all State insurance departments and to large employer and insurer trade organizations.

o Initial Claims Development

Medicare Contractors are required to collect information from beneficiaries about potential primary insurance coverage when they receive the first Medicare claim from a newly-eligible beneficiary. If the necessary information is not clearly provided on the claim form, contractors normally obtain this information by sending a questionnaire to the

beneficiary that asks about other insurance coverage, work status, spousal work status, etc. This information then becomes part of the history file on the beneficiary which is accessed when future claims are received.

o Other Identification Activities

-- Fiscal intermediaries are required to review all claims which contain diagnosis codes indicating trauma which may have resulted from an automobile or work-related accident.

-- Contractors are required by directive to share secondary payer information they discover with other contractors in the area. This information is automated, and all contractors have access to regional MSP information through a regional data base.

The Omnibus Budget Reconciliation Act (OBRA) of 1989 contained a provision that will assist HCFA in identifying secondary payer cases. In particular, this provision will be useful in identifying beneficiaries with health coverage through their spouse's employer group health plan. In the past, this category of beneficiaries with primary health coverage (beneficiaries who are covered through their spouses) has been difficult to find,

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and it is believed that this is the largest category of heretofore undiscovered MSP savings.

The OBRA legislative provision mandates a data match between the Internal Revenue Service (IRS), the Social Security Administration (SSA), and HCFA. The steps that will occur are the following:

- SSA provides the IRS with the names and social security numbers of all Medicare beneficiaries.

- The IRS provides SSA with a file of all Medicare beneficiaries and their spouses who filed a tax return.

- SSA cross-matches the IRS file against its Master Earnings File to determine whether a W-2 had been filed for the beneficiary or the beneficiary's spouse.

- SSA provides HCFA with resultant information on names and social security numbers of Medicare beneficiaries and their spouses and, if a W-2 was filed, the name of the individual's employer.

- HCFA will use a designated Medicare contractor to contact employers to determine whether an individual had employer health coverage.

- HCFA then uses the employer information to check its paid claims history data for mistaken Medicare payment. This information is provided to Medicare contractors for recovery.

This provision is time-limited. The authority to require employers to provide information or to suffer a civil monetary penalty expires FY 1991. HCFA anticipates recovery of $400 million in FY 1991 and $600 million in FY 1992 from the provision.

Since enactment of this legislation, HCFA, SSA, and the IRS have been working to coordinate the implementation of this provision. On February 17, the IRS and SSA began systems testing for the data match. HCFA is currently in the process of drafting a report that is required by the Computer Matching and Privacy Protection Act (CMPPA). This report must be completed prior to initiating data matches. Present scheduling anticipates HCFA receiving the information from SSA and beginning development with employers by October 1990. However, this is contingent upon obtaining clearances in relation to CMPPA and Paperwork Reduction Act.

Sometimes mistaken Medicare primary payments are made because insurers, underwriters, and third party administrators do not make primary payments that are required by the MSP provisions in

the law. In 1988, the Departments of Health and Human Services and Justice established an Inter-Agency Task Force on MSP noncompliance. The task force investigates the extent to which Medicare has made primary payments in secondary payment situations.

The Department of Justice has filed lawsuits against three insurance companies for violations of the MSP provisions as a result of task force investigations and independent evidence gathered by HCFA. These three companies are: Blue Cross and Blue Shield of Michigan; Provident Life and Accident Company; and the Travelers Insurance Company.

A favorable outcome in these three cases could set a legal precedent for establishing insurer liability in other cases and recovering additional Medicare overpayments.

In FY 1989, HCFA achieved secondary payer savings of $2.2 billion. It is estimated, however, that there may be an additional $1 billion annually in potential secondary payments that are currently unidentified.

The data match project has a two-year sunset provision, and HCFA plans to evaluate the success and effectiveness of this project

during FY 1991. After that evaluation, HCFA will be able to recommend to the Secretary future directions required for MSP identification.

Wage Reconciliation

I would now like to address the issue of reconciling differences between the amount of Social Security wages reported by employers to the Social Security Administration (SSA) and to the Internal Revenue Service (IRS). It is vital that the differences in wage amounts on SSA and IRS records be resolved promptly so that workers and their families are assured that their benefit amounts take account of all the worker's earnings which are covered under Social Security.

Several years ago, a workload of unprocessed reconciliation cases had developed for tax years 1978-1983. As a result of giving priority to the resolution of this problem, SSA has completed the cases for tax years 1978-1983. SSA has also undertaken a number of initiatives, in conjunction with IRS, that have improved the reconciliation process. SSA will, within the year, be processing reconciliation cases on a completely current basis.

Beginning with tax year 1978, employers were required by law to

report Social Security wages on an annual basis instead of the previously used quarterly basis. They continued to be required to report wage data to the IRS on a quarterly basis. The change to annual reporting resulted in significant numbers of cases where employer reports of wages to SSA and IRS did not match. Under annual wage reporting, employers report individual wage data annually to SSA on forms W-2 and W-3 and summary wage and tax data quarterly to IRS on forms 941. Since employers prepare the reports to SSA and IRS at different times and sometimes on the basis of different records, differences can occur between the wage information reported to the two agencies. GAO identified approximately 3.5 million such differences for tax years 1978-1983; wages differences totalled $ 58.5 billion for tax years 1978-84.

A revised Memorandum of Understanding (MOU) between SSA and IRS was signed in July 1988. It sets out the roles and responsibilities of each agency with respect to wage reconciliation. SSA agreed to resolve all differences involving higher amounts reported to IRS than to SSA for tax years 1978-1986; SSA and IRS share responsibility for resolving wage differences for tax year 1987 and subsequent years.

SSA has completed reconciliation for tax years 1978-1983 and anticipates that by October 1990 the cases for tax years through

1988 will be virtually completed. At that time SSA will be processing reconciliation cases on a current basis. As of December 31, 1989, the total value of the wage reconciliation case differences which SSA has resolved for tax years 1978-1988 was $111.7 billion.

In addition to improving the process of reconciling wage differences, efforts have been directed toward initiatives that would prevent wage differences from occurring. For example, in fiscal year 1989, SSA and IRS held 423 joint seminars to educate employers on their responsibilities. In addition, SSA and IRS are trying to improve employer reporting by improving the information sent to employers and modifying the forms employers have to fill out. SSA is also working with IRS to strengthen penalties assessed when employers erroneously report.

Another important way to assure that workers and their families get benefits which reflect all of the worker's earnings is for workers to check their Social Security earnings records periodically and notify SSA if all their earnings are not credited. SSA has made it easier for workers to check their records by issuing a Personal Earnings and Benefit Estimate Statement (PEBES)--containing a year-by-year display of earnings since 1951--to people who request it. SSA began sending these

statements out in August 1988. To date, they have been sent to about 7 million people.

The Omnibus Budget Reconciliation Act (OBRA) of 1989 contained a provision which requires SSA to provide these statements to all workers 25 and over by the year 2000. As a result, most workers will have the opportunity to review their earnings records well before they are eligible to retire, thereby making it easier for SSA to assure that workers' earnings records reflect all earnings reported.

Indian Health Service

To put the IHS high risk area into proper perspective, some background is necessary. The comprehensive health service program of the IHS is made up of 127 service units, 50 hospitals, 139 health centers, 7 school health centers and over 350 smaller health stations and treatment locations. IHS manages its field program through eleven area offices, which cover varying geographic regions throughout Indian country in 27 states. IHS employs approximately 12,500 persons and has an annual budget of $1.2 billion.

The program accomplishments of the Indian Health Service have been dramatic. For example, the maternal death rate for American

Indians and Alaska Natives dropped from 82.6 maternal deaths per 100,000 live births in 1957-1959 to 8.8 in 1985-1987, a decrease of 89 percent in twenty-eight years. This level is equivalent to that for the United States as a whole.

The IHS health services budget has almost doubled since 1983, from $679 million to our FY 1991 request of $1,212 million. During that same time period, the population served has increased from 903,000 to 1,136,000, a 26 percent increase. During the latter part of this period, the burden and stress on the IHS administrative infrastructure has increased sharply due to IHS having to implement Public Law 93-638 which amended the Indian Self-Determination and Education Act and IHS's elevation to agency status within the Public Health Service.

In FY 1989 the IHS planned, and in FY 1990 is implementing a comprehensive program of management improvement. Central to this program is their Quality Management Initiative focused at strengthening IHS administration and management by making immediate corrections where necessary, encouraging innovation in management systems and instilling in all IHS employees a commitment to professionalism, integrity, and accountability. Management areas targeted in FY 1990 include: contract health services; Medicare and Medicaid collections; other third party

collections; relationships with external authorities; senior management staff; Tribal direct care programs; and, Federal direct care programs.

The IHS has included the full implementation of the Federal Managers' Financial Integrity Act (FMFIA) as a top priority in its management improvement program. The Director, IHS, has established a new emphasis on the management oversight process to review the programs and activities of the agency with respect to the FMFIA and audit follow-up programs. Each fiscal year, broad program and administrative reviews are conducted by integrated teams of professional and subject matter specialists in at least four of the field Area Offices. The program team is lead by the Associate Director, Office of Health Programs and reviews with the area office all aspects of its health delivery system. The administrative team is lead by the Deputy Director and reviews with the area office all aspects of its administrative functions.

These reviews are complemented by more targeted reviews that are directed at specific activities.

The Assistant Secretary for Health, in conjunction with the Director, IHS, has directed that the internal review process for the following activities be initiated this fiscal year:

personnel; conference management; health promotion/disease prevention; contract health services; alcoholism programs; Medicare/Medicaid reimbursement; quarters management; sanitation facilities construction; Privacy Act; debt management; grants; service delivery facilities administration; gift administration; and program user fees.

The IHS will continue the use of accreditation by the Joint Commission on Accreditation of Health Care Organizations as the central core of its alternative internal control review for its health programs. This is especially important for quality of care and risk management considerations. It will further expand formal FMFIA coverage of its program areas by incorporating results of other programmatic reviews.

From my perspective, I am encouraged by the effort IHS is making to strengthen its administration and management activities. IHS performs a very difficult and extremely vital mission within our Department and has full support from all of us as it works toward further improvement.

Generic Drugs

In your letter, Mr. Chairman, you also inquired about how the Department is managing the situation involving illegal

gratuities, corporate fraud and deception, and manufacturing deficiencies in the generic drugs industry. Generic drugs are an important mainstay in our Nation's health care system. They provide consumers and their clinicians with a broad array of safe and effective medicines at lower costs. The availability of generic drugs is crucial to people on fixed incomes and budget conscious Federal agencies that provide health care, such as us, the Department of Defense, and the Department of Veterans' Affairs.

It is no understatement to say that we regard this betrayal of the public trust as morally repugnant and deplorable. Misconduct by three former drug product reviewers in the Food and Drug Administration and a number of generic drug companies has shaken public confidence in the quality of these products and threatened the integrity of FDA's generic drug review system.

In view of these events, Secretary Sullivan announced a series of corrective actions last August. The main goals of these actions are twofold. First, and foremost, they are designed to assure the safety and quality of generic drugs in the marketplace and to allay consumer apprehension. Second, they are intended to fortify the management practices and operational procedures governing FDA's scientific reviews of these products to ensure that market approval decisions are scrupulously fair.

Moreover, they are aimed at establishing systematic safeguards to assure that future actions by FDA scientists do not advantage or disadvantage certain drug firms.

I would like to highlight the actions that comprise the Secretary's remediation plan and briefly outline their status.

1. Increasing Surveillance: Last May, FDA embarked upon a multifaceted investigation that involved the following: (1) specialized audits of 36 major generic drug firms to ascertain whether their manufacturing processes conform to FDA-approved methods; (2) sampling and analyses of the 30 most prescribed generic drugs to determine whether they are bioequivalent to their brand-name counterparts; (3) analyses of premarket testing samples to confirm their authenticity; and (4) sampling and reviews of generic drugs used to treat serious medical conditions such as epilepsy, whose dosage in a patient's bloodstream is especially important in order to prevent adverse health consequences.

   - Of the 36 firms inspected, seven were found to have committed fraud, either by submitting counterfeit drug samples for premarket testing or falsifying records in product applications submitted to the FDA. These findings have formed the basis for appropriate

regulatory and criminal action, as well as the imposition of restrictions on Federal procurement of drugs produced by 13 firms. In addition, roughly 117 product recalls have occurred to halt commercial distribution of generic drugs whose quality was suspect due to company actions to defraud the FDA or to sub-standard manufacturing practices. Also, market approvals for 30 drugs have been or are in the process of being withdrawn.

I should note that this heightened state of industry surveillance will continue until all evidence of wrongdoing is exhaustively pursued, all malefactors identified are brought to justice, and the integrity of the generic drugs industry is fully restored.

- FDA testing of 1500 premarket samples and 28 critical treatment drugs is continuing, but has uncovered only one additional case of fraudulent drug test samples thus far.

2. Strengthening Management Controls: To ensure that all product applications receive fair and equal treatment and that drug reviews by FDA scientists are uniform and based strictly on science, the following steps have been taken:

- o The organizational stature of FDA's generic drugs program has been elevated to provide for greater accountability and oversight by senior agency managers. New management has been recruited to oversee the daily operations of this program. An internal quality control unit has been instituted to provide independent oversight over the assignment and conduct of product reviews. And a new technical advisory committee has been created to enable FDA to solicit impartial and expert advice from clinical specialists in the private sector on regulatory and scientific matters affecting the review of generic drugs.

- o Independent management audits of the generic drugs program -- its review procedures and management information systems -- have been conducted by the HHS Office of Inspector General. The audits have pinpointed various irregularities and deficiencies that are now being rectified by those in charge of the generics program. For example, standard operating

procedures are being implemented throughout the generic drugs program, which include policies such as "first-in, first-reviewed" to ensure proper sequencing of drug application evaluations.

- o FDA issued a Federal Register notice on February 20, 1990 inviting public comments, concerns and recommendations on any administrative aspect of its generic drugs program in an effort to identify and respond to all legitimate criticisms.

- o FDA has established a new "ombudsman" position in the Office of the Commissioner to assist in the resolution of disputes arising between the agency and any of the product industries that fall within its regulatory purview.

3. Providing Greater Deterrence: Current food and drug law does not contain sufficiently strong penalties to deter future illegal behavior. The Department has developed, and the Secretary has approved, a new legislative proposal that would authorize certain administrative and monetary sanctions when criminal conduct is shown to have influenced or possibly affected a product review by FDA. This legislation is presently undergoing final Administration review.

4. Financing Program Reforms: The actions I have described are in response to an unexpected and unforeseen series of events. In order to deal expeditiously and comprehensively with the problems, FDA has had to deploy resources already earmarked for other activities. Although this arrangement has met the short-term need, the Department believes it is essential that additional resources be allocated to sustain these systematic reforms and industry surveillance initiatives over the long term. Accordingly, the President's budget now before the Congress requests the resources necessary to deal with this problem; it is vital that we get them quickly.

Mr. Chairman, I now want to address point number two of your concern about problems in FDA - that of the review of the integrity of other application processes subject to FDA approval.

Upon learning last August of internal control weakness in the FDA's generic drug approval process which allowed certain reviewers to manipulate the process to provide preferential treatment or allow detrimental treatment to be given to certain drug manufacturing firms, the FDA decided to undertake an expedited internal controls review of all of its other product review processes.

This review was intended to determine whether similar problems

existed in these processes that might give rise to situations that surfaced in the generics program.

Those processes involved in this expedited review, conducted in October and November 1989, included the new drug application; biologic license application; medical device product applications (both the 510(k) and the premarket approval procedures); food and color additive petition; color certification; infant formula notification; food standards and temporary marketing permits; new animal drug application; and the investigational new animal drug application.

While the reviews were conducted expeditiously in order that the Agency could be assured that there were no serious problems similar to those of the generic drug program in other key pre-approval processes, the Agency also needed to quickly bring about a heightened awareness of the need for self-assessment of management controls in all programmatic areas through the internal controls review process under the Federal Managers' Financial Integrity Act.

Those reviews were completed with no finding of evidence that reviewers had, in fact, manipulated the system or performed any illegal acts. The reviews, nevertheless, detected several weaknesses in each of the processes - three of which the Agency considers "material" under the FY 1990 FMFIA program.

- Problems with physical and document security that could allow unauthorized individuals access to confidential or trade secret information.

- Failure to meet certain statutory timeframes which mean that the public is deprived of beneficial therapies.

- Lack of documented standard operating procedures which would insure consistent reviews in certain programs.

FDA, through its respective centers, has established corrective action plans to resolve all weaknesses uncovered. Development of these plans has had the involvement of management at the highest level in the center, and center management accepts full responsibility for ensuring that the problems identified are corrected.

FDA further believes that broader education among its managers at all levels on the requirements of the Federal Managers' Financial Integrity Act will serve to strengthen the implementation of this program. To that end the first formal course for working level managers in the FDA was provided February 1-2, 1990, with a second offering expected to take place in April 1990. Additional customized training for varying levels of higher management is being planned for FY 1990-91.

In addition, FDA will begin to review all of its remaining activities, including, for example, postmarketing surveillance and epidemiology, quality assurance, enforcement, and field laboratory operations. This effort will ensure full coverage through proper management oversight to its programmatic areas, and further assure protection from the recurrence of those problems which surfaced in the generic drugs program.

Mr. Chairman, this concludes my prepared remarks.

I now want to turn to Mr. Michael Astrue, HHS General Counsel, who will discuss, as you requested, the issue of delegation of authority to the Inspector General.

DEPARTMENT OF HEALTH AND HUMAN SERVICES RESPONSES TO
COMMITTEE ON GOVERNMENT AFFAIRS FOLLOW-UP QUESTIONS
FROM MARCH 8, 1990 TESTIMONY ON FMFIA ISSUES

Question 1

With regard to the Medicare Secondary Payer issue, the 2-year computer matching program contemplates heavy involvement by Medicare contractors. Do you have enough funding earmarked for these contractors to cover their new role in this activity? How did you estimate the amounts needed?

Response

We have budgeted $8.9 million in fiscal year (FY) 1991 and $10 million in FY 1992 to cover the contractor costs of the IRS/SSA/HCFA data match. We believe this will be sufficient to cover the cost of the activity.

The cost estimates were determined by estimating the number of potential new beneficiaries found to have other coverage and the number of employers to be contacted. Using this as a basis the contractor costs were projected based on personnel needed and the contractor cost for system changes. The estimates include the cost for contacting the employers as well as the cost of recovering previous mistaken payments.

Question 2(a)

With regard to the wage reconciliation issue, when will the IRS Form W-3 (Transmittal of Income and Tax Statements) be changed to require employers to perform "up-front" reconciliations of earnings reported to IRS and SSA? I understand the change was to be made for 1989, but there was a delay. What caused the delay?

Response

Form W-3 will be changed for tax year 1990 to require employers to state that the amount of Social Security wages reported to SSA agrees with the amount reported to IRS. The delay in revising the form was due to the amount of time IRS needed for form redesign, public comment, and printing of forms and instructions.

Question 2(b)

What is the "800" telephone number or address individuals should use to request PEBES? What information should people supply in making the request?

Response

To request a Personal Earnings and Benefit Estimate Statement (PEBES) over the telephone, people should call SSA's toll-free

800 number, 1-800-2345-SSA. Individuals who prefer to request PEBES by mail may write to their local Social Security office (the address is in the telephone directory) or to:

Consumer Information Center
Department 55
Social Security Administration
Pueblo, CO 81009

Those who want a PEBES request form mailed to them need furnish only their name and address. The PEBES request form itself (SSA-7004), is attached. It asks for additional information that SSA uses to make sure the estimate is as accurate as possible.

Question 3

I understand that in recent years the Secretary of HHS has certified the amounts to be credited to the Social Security Trust Fund on an interim basis and that at the present time there may be as much as $2.2 billion credited to the Fund that is unsupported by SSA earnings data. What is the corrected amount and how does SSA propose to resolve the certification problem?

Response

Since annual wage reporting became effective in 1978, Social Security wages have been provisionally certified on the basis of the amount of wages reported by employers to the Internal Revenue Service (IRS). As of February 7, 1990, (the date of the last certification of wages to the Department of Treasury), the difference in Social Security wages for tax years (TYs) 1978-1987 was $50.6 billion, which resulted in the trust funds being credited with $5.8 billion more in Social Security taxes than could be supported by SSA's records.

SSA has now processed virtually all reconciliation cases for TYs 1978-1983 and anticipates that virtually all cases for tax years through 1988 will be processed by October 1990. Since not all of the differences could be reconciled, e.g., the employer could not be located or had destroyed his records, there is a question as to which records should be used for final certification purposes.

If SSA records are used, the trust funds would be credited with substantially less than has been credited under the provisional procedure. If IRS records are used, no trust fund adjustments would be necessary. Of course, other alternatives are also possible. SSA is currently examining various options for final certification, but has not yet made a decision as to the best method to use. Form 941 (Employer's Quarterly Federal Tax Return) may offer the best indication of revenues due to the trust funds, since employers use the 941s to identify their specific tax liability to the Federal Government.

Question 4

Please provide the Committee with periodic written status reports on all of the FDA cases referred by the IG to DOJ as information becomes available to you from DOJ.

Response

On March 28, 1990, the Department of Justice issued guidance to the Office of Inspector General setting forth those categories of FDA-related matters that were appropriate for the IG to investigate. Pursuant to these guidelines, to date approximately 16 matters have been returned by DOJ to the OIG for investigation. The OIG has resumed or plans to resume work on an estimated 5 additional matters that are within its jurisdiction. The OIG is currently consulting with the Department of Justice concerning the disposition of the remaining investigations.

As of April 13, 1990, the Department of Justice has referred to FDA for investigation and development 35 matters that the Department of Justice received from the HHS-Inspector General. These matters are being investigated by FDA. The Department of Justice has advised that additional matters will be referred to FDA. The FDA investigative report on all of these matters and the agency's view of the significance of any apparent violation, will be forwarded to the Department of Justice for a final decision with respect to disposition of these matters. Reports on the status and disposition of these matters will be coordinated with the Department of Justice at the appropriate time.

Question 5(a)

Please identify all programs or agencies within HHS with a regulatory or enforcement mission. For those programs or agencies, please identify whether the statutory language governing each program or agency specifies which HHS officers or employees should undertake criminal investigations as part of the regulatory or enforcement mission, and if so, identify the specified officers or employees.

Response

There are a number of statutes which set forth criminal provisions applicable to fraudulent conduct against the Medicare and Medicaid programs. Those mainly include the Medicare and Medicaid Anti-Fraud and Abuse Amendments of 1977 and the Medicare and Medicaid Patient and Program Protection Act. The Office of Inspector General, through the Inspector General Act, assumed the authority to conduct criminal investigations under these authorities. The employees within the Office of Inspector General who undertake these activities are primarily the criminal investigators (Series 1811). In addition, federal legislation

has authorized states to create Medicaid fraud control units specifically charged with investigating Medicaid crimes. The Office of the Inspector General is charged with overseeing the operations of these fraud control units.

The Food and Drug Administration administers a number of regulatory statutes, which are identified at 21 CFR 5.10, all of which vest administrative authority in the Secretary of Health and Human Services. The Secretary has delegated to the Assistant Secretary for Health, who has redelegated to the Commissioner of Food and Drugs, all regulatory and enforcement responsibilities under those statutes. The principal statutes include the Federal Food, Drug, and Cosmetic act, which concerns premarket approval and post-market surveillance for drugs, medical devices, foods, and cosmetics, and certain portions of the Public Health Service Act concerning biologicals and electronic products which emit radiation. Section 903 of the Federal Food, Drug, and Cosmetic Act specifies that the Secretary shall be responsible for executing the Act "through the Commissioner". Section 702 of this Act authorizes the Secretary to use unspecified officers and employees of the Department to conduct examinations and investigations under the Act.

The Office for Civil Rights has responsibility for the enforcement of a number of civil rights laws. The principal statutes are Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and the Hill-Burton Act (those portions which impose community service requirements on recipients). No criminal investigations are conducted under these authorities by offices or employees of the Office of Civil Rights.

While all of the programs and agencies within the Department of Health and Human Services involve a "regulatory" mission in the sense that rules and regulations are published to implement the laws under which such programs and agencies operate, the activities above are the only ones we have identified as involving a specific mandate to control an industry or enforce a statute.

Question 5(b)

How many criminal investigators (1811s) are currently employed in each of the programs or agencies identified in 5(a) above?

Response

The Department employs approximately 302 criminal investigators (Series 1811), all of whom are within the Office of the Inspector General.

Question 5(c)

How many criminal investigator (1811) positions are requested in the FY 91 budget and how many will be requested in the FY 92 budget for each agency or program listed in 5(a) above?

Response

The OIG does not "break out" the number of criminal investigator positions requested in the budget. Rather, the Office of Investigations lists the overall number of FTEs, including criminal investigators, other professionals, and support staff. For FY 91 that total is approximately 460 FTEs.

The FDA FY 1991 budget now pending before Congress requests additional investigative personnel. FDA is now developing a hiring plan that may include GS-1811 positions.

Since budget plans for FY 1992 have not been finalized in HHS or cleared by the Office of Management and Budget, we are unable to provide you with this information.

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Office of the General Counsel
Washington, D.C. 20201

March 27, 1990

The Honorable John Glenn
Chairman, Committee on Governmental Affairs
Room 340, Dirksen Senate Office Building
Washington, D.C. 20510-6250

Dear Senator Glenn,

During my testimony before your Committee on Governmental Affairs on March 8, 1990, I indicated that the Food and Drug Administration did not have any GM/GS-1811 criminal investigators and that there might be statutory or regulatory barriers to the agency hiring such investigators.

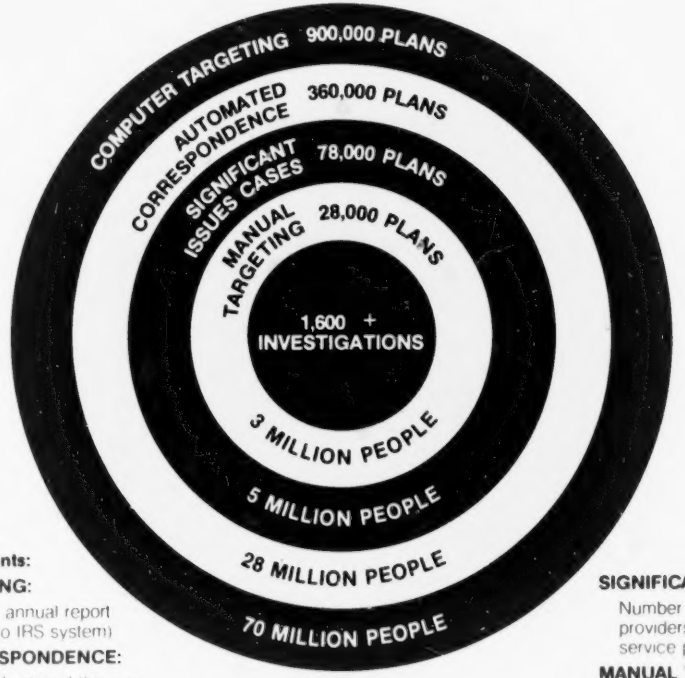
I have confirmed with the FDA that it does not employ any GM/GS-1811 criminal investigators. However, my staff has concluded that there are no legal barriers for the agency to hire GM/GS-1811 criminal investigators, and that the agency believes that many of its current investigators have the credentials to qualify for such a classification. Acting Commissioner Benson is now actively considering hiring such investigators.

I am sending an identical letter to Senator Roth.

Sincerely,

Michael J. Astrue
General Counsel

PENSION ENFORCEMENT STRATEGIES



Strategy is composed of 4 separate and distinct elements:

COMPUTER TARGETING:

System reviews every annual report for violations (Similar to IRS system)

AUTOMATED CORRESPONDENCE:

System sends out notification if there is any deficiency in a plan's annual report

SIGNIFICANT ISSUES CASES:

Number of plans affected by review of service providers and financial institutions that service pension and welfare plans

MANUAL TARGETING:

Review of annual reports by PWBA's 15 enforcement field offices

U.S. Department of Labor

Pension and Welfare Benefits Administration